DOCUMENT RESUME

ED 459 514 EA 031 464

AUTHOR	Johansen, Ingrid M.
TITLE	Public School Volunteers: Law and Liability in North Carolina.
INSTITUTION	North Carolina Univ., Chapel Hill. Institute of Government.
ISBN	ISBN-1-56011-358-8
PUB DATE	1999-00-00
NOTE	107p.
PUB TYPE	Books (010) -- Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Board of Education Policy; *Court Litigation; Elementary Secondary Education; *Legal Responsibility; *Public Schools; *School Law; *Volunteers
IDENTIFIERS	*North Carolina

ABSTRACT

Volunteer involvement in North Carolina public schools is steadily increasing, yet few local school boards have official policies governing the use of volunteers in their schools. An official volunteer policy reduces the risk of injury to participants in school volunteer programs, reduces a school board's liability exposure, and reduces volunteers' own exposure to liability. Screening mechanisms designed to help prevent dangerous or unqualified individuals from gaining access to school facilities, employees, and students reduce the risk of injury in public schools using volunteers along with specific guidelines on training and supervising volunteers. This book addresses the major liability issues for volunteers and school boards in three parts: (1) the risk of liability for volunteers themselves; (2) direct school board liability; and (3) vicarious school board liability. A discussion of methods for reducing risk in volunteer programs concludes the book. Appendices contain the Volunteer Protection Act of 1997, a volunteer position risk-assessment tool, an interview protocol for higher risk roles, a volunteer and visitor sign-in sheet, and a general consent form for volunteers. (RT)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 459 514

INGRID M. JOHANSEN

Public School Volunteers

Law and Liability in North Carolina

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

K. Hunt

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

BEST COPY AVAILABLE

INSTITUTE OF GOVERNMENT
The University of North Carolina at Chapel Hill

EA 031464

Public School Volunteers: Law and Liability in North Carolina

Ingrid M. Johansen

1999

INSTITUTE *of* GOVERNMENT
The University of North Carolina at Chapel Hill

THE INSTITUTE OF GOVERNMENT of The University of North Carolina at Chapel Hill is devoted to teaching, research, and consultation in state and local government.

Since 1931 the Institute has conducted schools and short courses for city, county, and state officials. Through monographs, guidebooks, bulletins, and periodicals, the research findings of the Institute are made available to public officials throughout the state.

Each day that the General Assembly is in session, the Institute's *Daily Bulletin* reports on the Assembly's activities for members of the legislature and other state and local officials who need to follow the course of legislation.

Over the years the Institute has served as the research agency for numerous study commissions of the state and local governments.

Michael R. Smith, DIRECTOR
Thomas H. Thornburg, ASSOCIATE DIRECTOR FOR PROGRAMS
Patricia A. Langelier, ASSOCIATE DIRECTOR FOR PLANNING AND OPERATIONS
Ann C. Simpson, ASSOCIATE DIRECTOR FOR DEVELOPMENT

FACULTY

Gregory S. Allison
Stephen Allred
David N. Ammons
A. Fleming Bell, II
Maureen M. Berner
Frayda S. Bluestein
Mark F. Botts
Phillip Boyle
Joan G. Brannon
Anita R. Brown-Graham
William A. Campbell
Margaret S. Carlson
Stevens H. Clarke
Anne S. Davidson
Anne M. Dellinger
James C. Drennan
Richard D. Ducker
Robert L. Farb
Joseph S. Ferrell
Susan Leigh Flinspach
L. Lynnette Fuller
Milton S. Heath, Jr.
Cheryl Daniels Howell
Joseph E. Hunt
Kurt J. Jenne
Robert P. Joyce
David M. Lawrence
Charles D. Liner
Ben F. Loeb, Jr.
Janet Mason
Laurie L. Mesibov
Jill D. Moore
David W. Owens
William C. Rivenbark
John Rubin
John L. Saxon
John B. Stephens
A. John Vogt
Richard Whisnant
Gordon P. Whitaker
Michael L. Williamson
(on leave)

© 1999
Institute of Government
The University of North Carolina at Chapel Hill
∞ This publication is printed on permanent, acid-free paper in compliance with the General Statutes.
Printed in the United States of America
03 02 01 00 99 5 4 3 2 1
ISBN 1-56011-358-8
⊛ Printed on recycled paper

Contents

Preface / v

Introduction / 1

1 **Liability of Volunteers / 3**

When Is a Volunteer Shielded from Liability? / 4
    Negligence for which a Volunteer May Be Held Liable / 5
    Gross Negligence / 6
    Summary—Protected Conduct / 6
When Is a Volunteer Not Shielded from Liability? / 7
    Criminal Violations / 7
    Intentional Torts / 7
        Battery / 9
        Defenses to Intentional Torts / 12
    Summary—Unprotected Conduct / 12
What Does the VPA's Protection Mean for Volunteers? / 12
Chapter Summary / 14

2 **Direct School Board Liability / 19**

Unsafe Conditions on School Premises / 20
    Unsafe Physical Conditions / 20
    Unsafe Conditions Caused by Persons / 22
Negligent Employment / 24
    Negligent Employment of Paid Employees / 24
    Negligent Employment of Volunteers / 27
Chapter Summary / 34

3 **Vicarious School Board Liability / 39**

Vicarious Liability, Generally / 40
Vicarious Liability for Volunteers, Generally / 41
    Establishing the Master-Servant Relationship / 42
        Board's Right to Control the Volunteer / 43
        Board's Consent to Receive Volunteer Services / 47
        Acting within the Scope of Employment / 48
    Summary—Master-Servant Relationship / 50
Defenses to Vicarious Liability for Volunteer-caused Harm / 51

The Fellow Servant Rule / 51
The Volunteer Protection Act / 52
Chapter Summary / 54

4 Policies for Minimizing Risk in School Volunteer Programs / 59

Preliminary Considerations / 60
Opposition to the Development of a Volunteer Policy / 60
Liaison Organizations / 62
Policy Creation / 63
Elements of an Official Volunteer Policy / 64
Screening / 64
Position Descriptions / 64
Applications / 66
Interviews / 68
References / 69
Other Background Checks / 70
Summary—Screening / 71
Training / 72
Supervision / 72
Secondary Prevention / 73
Designing the Policy / 74
Reasonable as Developed / 74
Reasonable as Applied / 76
"Volunteer Rights" / 78
Nondiscriminatory Policies / 79
Privacy / 80
Summary—Volunteer Rights / 83
Benefits / 84

Appendix A: Volunteer Protection Act of 1997 / 89

Appendix B: Volunteer Position Risk-Assessment Tool / 95

Appendix C: Interview Protocol / 99

Appendix D: Volunteer and Visitor Sign-in Sheet / 103

Appendix E: General Consent Form for Volunteers / 105

Preface

AT THE TIME this publication was written, most public school systems did not have in place official policies for screening, training, and supervising volunteers. The failure to regulate the use of volunteers poses a significant risk of harm to persons on school premises and could expose school boards to legal liability. Once school officials and other interested parties adequately understand the legal necessity of regulating the use of volunteers in the public schools, and after they learn how to regulate in a way that comports with the law, I believe that they cannot—responsibly—fail to do so. This publication attempts to impart the knowledge necessary to incite such action.

During the course of this project I have become deeply convinced of its importance. At the beginning, however, I undertook it only because of the great faith I placed in the judgment of Laurie L. Mesibov, an Institute of Government faculty member whose discerning analysis of the volunteer situation had convinced her—well before the majority of others in the education field—that such a project was necessary. I am grateful to have been the beneficiary of her original insight as well as her ongoing assistance. I would also like to thank Robert P. Joyce, whose substantive and editorial support was of great value to me. Finally, I would like to express my gratitude to Melissa M. Twomey, the editor of this publication and some of its earlier incarnations, for her work.

Introduction

VOLUNTEER INVOLVEMENT in North Carolina public schools is steadily increasing, yet few local school boards have official policies governing the use of volunteers in their schools.[1] Now is the time for this to change. A *volunteer*, as the term is used in this book, is a person who provides service to a public school without expectation of compensation and with the understanding that the school is under no obligation to continue accepting that service.[2] In this publication, a *volunteer policy* is a policy containing three essential elements: mechanisms for screening volunteers, guidelines for training and supervising them, and rules for handling harms that occur in relation to their service. A policy is *official*, for the purposes of this publication, if it is developed by a body within the local school system that has the authority to implement it (most probably the board itself); if it is written and communicated to relevant parties; and if it is, or is intended to be, consistently applied.

Screening mechanisms designed to help prevent dangerous or unqualified individuals from gaining access to school facilities, employees, and students reduce the risk of injury in public schools using volunteers; so, too, can specific guidelines on training and supervising volunteers. Having in place rules for dealing with harm when it does occur—called *secondary prevention* by one observer [3]—reduces the likelihood that harm will be made worse or repeated.[4]

An official volunteer policy reduces the risk of injury to participants in school volunteer programs—indeed, this should be the chief goal of such a policy. But there is also a second, additional important benefit: an official volunteer policy reduces a school board's liability exposure. Fewer potential injuries mean fewer potential lawsuits; moreover, the existence of a volunteer policy may act as a deterrent to suits even when injury does occur.[5] If a lawsuit is filed, the existence of an official volunteer policy will help protect a school board from liability by serving as evidence that the board took reasonable measures to keep its volunteer program safe. There is a third benefit, too. An official volunteer policy should also help reduce volunteers' own exposure to liability. By increasing the likelihood that a volunteer will be qualified for a given position, understand the responsibilities and limits of the position, and be adequately supervised, a volunteer policy reduces the risk of injurious behavior by the volunteer.

In the pages that follow, this publication addresses the major liability issues for volunteers and school boards in three parts: (1) the risk of liability for volunteers themselves, (2) direct school board liability, and (3) vicarious school board liability. The book concludes with a discussion of methods for reducing risk in volunteer programs.

Notes

1. Local boards are unquestionably empowered to promulgate and enforce such guidelines. *See* Chapter 115C, Section 36, of the North Carolina General Statutes.

2. Definition adapted from Lynn Buzzard and Susan Edwards, *Church Hiring and Volunteer Selection: A Risky Business* (Cary, N.C.: Baptist State Convention, 1995), 59, sec. C-4. Note that in the proper circumstances, school employees or board members could meet this definition of volunteer: for example, a public high school teacher could help out at a bake sale at his or her child's elementary school. This discussion of volunteers generally will not, however, address employees and board members, because in some cases determining whether an employee or board member was acting in his or her official capacity or in a voluntary capacity can be complicated by issues beyond the scope of this book. For example, an issue of concern to public school personnel administrators is the overtime compensation requirement that may apply under the Fair Labor Standards Act, 29 U.S.C.A. §§ 201–19 (1978), when employees subject to that law "volunteer" their services.

3. John Patterson et al., *Child Abuse Prevention Primer for Your Organization* (Washington, D.C.: Nonprofit Risk Management Center, 1995), 41.

4. *Ibid.* Secondary prevention operates on the theory that someone who mistreats children will repeat the misconduct with the same child or with other children unless or until prevented from doing so.

5. That is, because evidence of "due care" will be shown through diligent application of a volunteer policy, persons injured may be less likely to bring suit.

1 Liability of Volunteers

WHILE ALL VOLUNTEERS should be concerned about potential liability in connection with the services they provide, public school volunteers now have less reason for concern than they once had. Recently enacted federal legislation, called the Volunteer Protection Act of 1997 (hereinafter VPA),[1] limits the circumstances in which volunteers for nonprofit organizations and governmental entities can be held liable for harm they cause in the course of their duties. Congress passed the VPA in response to a perceived crisis in volunteerism—a situation caused by volunteers' fear of lawsuits.[2] (See Appendix A for the full text of the VPA.)

Before the VPA, public school volunteers in North Carolina had several reasons to fear lawsuits. First, the kinds of services they typically perform—driving students to school-related activities or coaching student teams, for example—often entail an inherent risk of serious harm. While this risk may not itself be great, the actual harm that may occur could be quite serious (a head-on collision, for example, in the course of driving students to school-related activities). Second, working with students carries its own risks. Minor children are usually more vulnerable to injury than are adults, and children with disabilities are often more vulnerable to injury than are children without disabilities. And third, before the VPA school volunteers received little meaningful legal protection under state law.

Although North Carolina did have a statute (past tense because it is no longer effective) that purportedly granted immunity to volunteers serving charitable organizations (and which would have covered some public school volunteers), this statute turned out, upon closer analysis, to grant volunteers immunity from suit when they least needed it: It protected them only when they would not have been liable for negligence anyway.[3] In effect, the statute gave covered volunteers no more than they already had under the common law—namely, the right not to be held liable for conduct that shows due care.

Lacking, as they were, any special statutory protection, volunteers were governed by the common law. Under the common law, even though volunteer service is a gratuitous undertaking, a volunteer has the duty to exercise some degree of skill and care in performing that undertaking. Failure to exercise the degree of care for the safety of others (or their property) that a reasonably prudent person under like circumstances would exercise is deemed negligence. Public school volunteers could be held liable for harm caused by their negligence, and state law provided no limitations on the damages that could be awarded against them.

In the absence of statutory protection, public school volunteers had one final reason to fear liability: they were sometimes the only potential defendants available to be sued. School boards and persons holding official positions within the school district are sometimes immune from suit (because of sovereign immunity); without the protection of the VPA, the volunteer was often the only accessible defendant.

The VPA changes the legal landscape for North Carolina public school volunteers by superceding state law that is inconsistent with its provisions. Most significantly, public school volunteers are now no longer held to the negligence standard. The VPA protects qualified volunteers (those serving nonprofit or governmental organizations) from liability for harm they cause while acting within the scope of their duties, so long as the harm is not caused by willful or criminal misconduct or by gross negligence. Harm resulting from simple negligence will not subject qualified volunteers to liability. In addition, the VPA limits the damages a claimant can recover in cases where a volunteer *can* be held liable.

This change in liability rules is significant and should be cause for relief among public school volunteers. Nonetheless, the VPA's protection is subject to some important qualifications. First, the statute shields volunteers from liability only when they cause harm as a result of simple negligence, and then only in certain circumstances. This leaves many situations in which volunteers may still be subject to liability for harm caused during volunteer service. Second, the VPA, while limiting *the potential liability* of volunteers in certain cases, does not limit the right of an injured person to bring suit against them.

When Is a Volunteer Shielded from Liability?

Under the VPA, the general rule is that qualified volunteers cannot be held liable when they cause harm as a result of negligence.[4] Negligence is the failure to exercise that degree of care a reasonable person in like circumstances would exercise—in other words, negligence is the failure to exercise *due care*. There is no element of intentional misbehavior in regular negligence. A volunteer at a school clean-up day leaves a rake in the school yard, and a student trips over it and breaks her leg. A volunteer at an after-school day care center briefly falls asleep during quiet time, one child gets up and leaves the building and is bit by a dog running loose on the school playground. A volunteer accidentally sits on a student's laptop computer, smashing the keyboard. Each of these cases illustrates harm caused by a volunteer's negligence, and in each of them the negligent volunteer would be protected from liability under the VPA.

Negligence for which a Volunteer May Be Held Liable

Although generally a volunteer cannot be held liable for harm resulting from negligence, there are exceptions to this rule. First, a volunteer's negligence can lead to liability when the action that caused the harm occurred outside of the scope of the volunteer's school duties.[5]

EXAMPLE 1 *A representative from the local shooting club volunteers to give a presentation on gun safety at the local grade school. Several boys in the class are deeply interested in the subject matter and ask the representative to meet with them after school to talk more about it. At this after-school meeting, the representative lets some of the boys handle the gun he used in his presentation. While one boy is handling the gun, he gets his finger caught in the trigger mechanism, breaking his finger. If the student's parents sued the volunteer for negligently entrusting the gun to their child, the volunteer probably could be held liable (if his conduct is found to be negligent), because his duties as a volunteer did not include meeting with students after-hours or allowing them to handle a gun.*

Second, the VPA provides that a volunteer can be held liable for negligence when the activities he or she was undertaking when the harm occurred require licensure, certification, or authorization by the appropriate authorities, but the volunteer is not so licensed, certified, or authorized.[6] Presumably, as a general matter of negligence doctrine, the negligence that caused the harm would have to be related to the reason the state requires licensure, certification, or authorization for engaging in a particular activity or practice.

EXAMPLE 2 *A school parent who has recently moved to North Carolina from Guam volunteers her expertise as a doctor to train a student group in first aid techniques. During one of the sessions a student begins choking on a piece of candy. The volunteer uses this emergency as an opportunity to train the students in the Heimlich maneuver, but she performs it incorrectly and it is several minutes before someone else is able to get the student breathing regularly. The student's parents bring suit against the volunteer for damage the student suffered during the choking episode, and evidence reveals that the volunteer, although licensed to practice medicine in Guam, is not so licensed in North Carolina. This volunteer would probably be held liable for negligently performing the Heimlich maneuver: each state requires medical professionals to be certified to practice within that state in order to assure that each professional meets the particular state's standards for the profession.*

Third, the VPA provides that a volunteer can be held liable for negligence if the harm was caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires an operator's license or insurance.[7] This is an important exception for school volunteers to keep in mind, because even in circumstances where a school board's liability insurance policy covers volunteers, it is likely that the policy also excludes coverage for harm caused during the operation of a motor vehicle.

Finally, and more broadly, under the VPA volunteers can be held liable if they cause harm while under the influence of alcohol or drugs, even if the harm itself was caused by conduct that only amounts to negligence.[8]

Gross Negligence

Broadly stated, the VPA protects volunteers from liability when they cause harm as a result of negligence. *Gross negligence*, however, is specifically exempted from the VPA's protection.[9] A notoriously fuzzy concept, gross negligence can be said to signify more than ordinary inattention but less than conscious indifference to consequences.[10]

EXAMPLE 3 *The facts are the same as in Example 1, above, except that the gun used by the volunteer for his presentation turns out to be loaded. While the students are handling the gun during the after-school get-together, the gun goes off, shooting one of the students in the foot. If the volunteer* didn't know *the gun was loaded, but also* did not check *to see whether it was loaded before bringing it to school and letting a student handle it, his conduct probably constitutes gross negligence.*

Where the line between regular and gross negligence lies often cannot be determined beforehand; this uncertainty may frustrate, to some extent, the VPA's purpose of easing volunteers' fear of lawsuits. A person injured by a volunteer may fairly easily come up with an allegation of gross negligence.[11]

Summary—Protected Conduct

Overall, public school volunteers have much greater protection from liability under the VPA than they had in the past under North Carolina law. In most circumstances they cannot be held liable for harm that results from plain negligence. And negligence—the honest mistake, the good-faith error—accounts, common sense says, for most of the harm that occurs in school volunteer programs. However, volunteers must keep in mind the following circumstances in which they *can* be held liable *even for negligence*: (1) when the harm was caused by an action that occurred outside the scope of the volunteer's duties; (2) when the harm was caused by an activity or practice for which the state requires licensure, certification, or other authorization and for which the volunteer had no such credentials; (3) when the harm was caused while the volunteer was operating a motor vehicle or other vehicle for which the state requires a license or liability insurance; and (4) when the harm was caused by a volunteer under the influence of alcohol or drugs. Volunteers should also take note that the VPA limits liability for harm caused only by regular negligence, not gross negligence.

When Is a Volunteer Not Shielded from Liability?

The VPA does not shield volunteers from liability for harm they cause through intentional wrongdoing. Intentional wrongs are generally grouped into two categories: criminal violations and intentional torts. Criminal violations will, one hopes, be rare in school volunteer programs; if a volunteer does engage in such behavior, however, he or she can be prosecuted in the criminal courts and sued for damages in the civil courts.[12] What is less clear is whether under the VPA a volunteer can be held liable for intentional torts—such as assault or battery—that cause harm.

Criminal Violations

While the VPA protects qualified volunteers from liability in certain civil suits, it does not immunize them from prosecution in criminal suits. Furthermore, a volunteer can still be held fully liable *in civil court* for harm caused by an act that constitutes a "crime of violence";[13] a "hate crime";[14] a sexual offense, as defined by applicable state law, for which the defendant has been convicted in any court; for misconduct for which the defendant has been found to have violated a federal or state civil rights law;[15] or for an "act of international terrorism" for which the defendant has been convicted in any court.[16] Each of these exceptions—aside from the hate crimes provision—requires that the volunteer first have been adjudged, in court, to be guilty before he or she is held liable in civil court.

Intentional Torts

Intentional torts are acts that interfere with another person or with that person's property. They include assault, battery, defamation, false imprisonment, trespass, and infliction of emotional distress. The elements of an intentional tort action are (1) an act by the volunteer (2) that was intentional and (3) that caused injury.[17]

It is unclear whether the VPA restricts liability for harm a volunteer causes as a result of an intentional tort.

EXAMPLE 4 *A volunteer hall monitor in a public school bruises a student's arm when he grabs the student to prevent her from running down the hall. This action would constitute the intentional tort called battery. Intentional torts, as opposed to negligent torts, are those where harm results from an intentional act. In the example, the arm grabbing that caused harm was a specifically intended action, even if the bruised arm was not the specifically intended result.*

Would the VPA protect the volunteer from liability in this case? The statute's legislative history gives little guidance on this question. At congressional hearings on the VPA and later in the congressional record, speakers stressed repeatedly that the VPA protects only simple negligence; in explaining this position, speakers frequently followed up with the statement that volunteers should not be held liable for harm resulting from honest mistakes or good faith errors. These statements can be read in (at least) two ways: first, the standard may be viewed as a legal one, focusing on whether—in traditional legal terms—the harmful conduct comes within the category of simple negligence. Or second, the standard may be viewed as more commonsensical, focusing on the volunteer's mind set when he or she acted in the way that caused harm. Under the first reading, as a matter of legal terminology, intentional torts are not analogous to negligent torts. In determining whether an intentional tort has been committed, courts do not focus on whether the defendant exercised due care but rather on whether the defendant's intentional act caused harm.[18] On the other hand, as the hall monitor example illustrates, harm caused by intentional torts may result from honest mistakes or good faith errors, just as in cases of simple negligence.

The text of the VPA is slightly more helpful than the legislative history, but it is still not conclusive. The text seems to indicate that the VPA does not protect volunteers from liability for harm caused by intentional torts. Two factors lead to this conclusion. First, the VPA's text does not reiterate the "good faith" language used in its legislative history, which may mean that the term *simple negligence* should be understood in its legal, rather than moral, sense. And second, as a matter of legal categorization, intentional torts do seem to fit within the range of conduct the VPA excludes from its protection. The least blameworthy conduct the VPA exempts from its protection is *gross negligence*, which requires no specific intent—either to act or to cause harm. On the other end of the scale, the most blameworthy conduct the VPA exempts from its protection is *willful* or *criminal misconduct*, which requires both intent to act and intent to cause harm. Intentional torts, requiring the intent to act but not the intent to cause harm, would seem to fall somewhere between these two kinds of conduct, and thus logically would fall within the range of conduct excluded from the VPA's coverage.

Until the issue of whether volunteers can be held liable under the VPA for harm caused by intentional torts is answered by a court of binding authority, public school volunteers should operate on the presumption that they can be held liable for such harm. With this in mind, one particular intentional tort is especially worthy of mention.

Battery

The intentional tort of battery deserves special attention because of the likelihood of its occurrence and the lack of clarity about when a volunteer might be justified in committing the tort. *Battery* is the act of making unwanted physical contact with the person of another. As the hall monitor example shows, it need not involve violent intent or serious injury. Not *all* unwanted physical contact is battery, however. For example, a volunteer who places her hands on the shoulders of a student who is out of line has possibly made unwanted physical contact with the student, but contact of this kind—contact that is reasonable and expected under the circumstances—does not constitute battery. More complicated issues arise when a volunteer makes contact with someone, usually a student, that clearly is battery but that seems justified under the circumstances.

There are three circumstances in which a volunteer might wonder whether it is appropriate or permissible to make unwanted physical contact with a student: (1) when a disturbance arises that threatens serious injury to persons or property, (2) when physical contact is necessary to maintain order, and (3) when a student is judged to be in need of discipline.

Circumstance 1: Quelling disturbances that threaten serious injury to persons or property

Two or more students are fighting on school grounds. Does a volunteer who makes physical contact with one of these students while breaking up the fight commit a battery for which he or she would be liable?

The answer is unclear, but there are three reasons that make it unlikely that this contact would lead to liability. First, as mentioned above, contact that is reasonable under the circumstances is not battery, and physical contact used in breaking up a fight may strike a court as reasonable. Second, it might be said that, by virtue of engaging in the fight on school premises, the students have impliedly consented to the degree of physical contact necessary to break it up. Third, it can be argued that volunteers are among the category of school "personnel" who are specifically authorized by North Carolina statute to use reasonable physical force in such circumstances. Chapter 115C, Section 391, of the North Carolina General Statutes (hereinafter G.S.) states that school *personnel* may use reasonable force to control behavior or to remove a person from the scene when it is necessary (1) to quell a disturbance threatening injury to others; (2) to obtain possession of weapons or other dangerous objects on the person, or within the control of, a student; (3) for self-defense; or (4) for the protection of persons or property. The fact that the statute speaks only to school *personnel* leaves uncertainty as to whether school volunteers are authorized to use such force; perhaps volunteers do qualify as personnel, or perhaps not. The term "personnel" may be broader in scope than the term "employee," encompassing not only persons employed by an organization but also people merely *associated with* it.[19] On the other hand, many places in the education section of the General Statutes use the term "personnel" where it seems fairly evident that only employees are contemplated.[20] So it is not clear whether a volunteer is statutorily authorized to use force to quell disturbances threatening injury, and it is therefore not clear whether the statute would play any role in determining a volunteer's liability for battery in quelling such disturbances.

The three considerations discussed above seem to indicate that a volunteer using physical contact to quell a disturbance would not be held liable for battery. The correctness of such a conclusion, however, is by no means certain. A court might interpret the term "personnel" as used in the statute to not include volunteers. In that event, a court might conclude that since volunteers are not specifically *authorized* by the statute to use force to quell a disturbance, they are in fact *prohibited* from using such force. Also, it is not always possible to predict in advance what level of contact a court might find reasonable in any given set of circumstances. A volunteer not accustomed to life in a crowded school might overreact to conduct that those more acclimated would take in stride. The most prudent advice for volunteers is to refrain from using physical force in all but the most compelling of circumstances.

A clear example of such a compelling circumstance is where a volunteer acts in self-defense or in the defense of another person to prevent imminent injury. If a volunteer has reasonable grounds to believe that he or she is about to be attacked, the volunteer may use as much (and only as much) force as is reasonably necessary to protect against that injury. The volunteer may also be justified in using force in defense of a third person if the volunteer reasonably believes that the third person might himself or herself be entitled to use self-defense. So, for example, the volunteer who injures a student who is coming at her with a knife probably would not be held liable for battery; nor, most likely, would a volunteer who injured a student who was approaching another student with a knife.

Circumstance 2: Acting to maintain order

Two students are chasing each other down the hall during the time between classes. If a volunteer grabbed one of the students to stop her from running and bruised her arm, would the volunteer be held liable for battery?

As in the case of quelling disturbances that threaten injury, it seems likely that in most situations occurring in schools, volunteers would not be held liable in battery for using force to maintain order. First, it is likely that most contact of this type would be seen as reasonable in the circumstances. Second, it might be argued that the students involved, by running down a school hallway, had in effect consented to a certain level of physical contact to control their misbehavior. And third, it may be that a small subset of volunteers is specifically authorized by a special North Carolina statute to use reasonable force to "restrain pupils and maintain order." That authorization is extended by G.S. 115C-390 to teachers (among others) and, by the explicit wording of the statute, to "voluntary teachers."

But who qualifies as a *voluntary teacher*? The term is not defined in the General Statutes, the North Carolina Administrative Code, or the State Board of Education Policy Manual; nor is it mentioned in the state allotment or salary schedule manuals. The absence of the term from sources that extensively cover the employees of local school boards indicates that voluntary teachers are probably volunteers who teach, not employees.

These considerations make it seem unlikely that a volunteer would be held liable in battery for having used physical contact to maintain order. For several reasons, however, such a conclusion is shakier in this context—"maintaining order"—than in the "quelling disturbance" context discussed above. First, even if the statute authorizing voluntary teachers to use reasonable force to maintain order *does* protect volunteers who teach, this protection covers a very small group of volunteers.[21] Second, physical force is less likely to be "necessary" (and therefore less likely to be reasonable under the circumstances) to maintain order than it is to quell a disturbance that threatens injury. Third, because the statute authorizing reasonable physical force to maintain order specifically enumerates those entitled to its protection (principals, teachers, teachers' assistants and volunteer teachers)—unlike the statute authorizing the use of force to quell disturbances, which extends protection to the nonspecific group called "school personnel"—a court may be more likely to find that those *not* specifically authorized to use force to maintain order are in fact *prohibited* from using such force. Finally, it bears repeating that it is not always possible to predict what level of contact will be judged by a court to have been reasonable in any given circumstance. Therefore the most prudent advice is that volunteers refrain from the use of physical force in all but the most compelling of circumstances.

Even if volunteers who are acting as teachers are authorized under G.S. 115C-390 to use reasonable force to maintain order, they still must check to make sure that they also are so authorized under their local board's policy. A local board may entirely prohibit the use of physical force for maintaining order.

Circumstance 3: Disciplining by administering corporal punishment

Volunteers are not authorized to administer corporal punishment (that is, discipline using physical contact). Teachers, substitute teachers, principals, or assistant principals are the only persons statutorily authorized to administer corporal punishment, and they may do so only in limited circumstances.[22]

Defenses to Intentional Torts

Assuming, as appears to be the law, that a volunteer can be held liable for harm resulting from intentional torts, some of the legal defenses available to the volunteer may be limited if the person harmed is a minor. Consent, for example—a key defense to intentional torts—may be unavailable because of the law's presumptions about a minor's capacity to consent. Generally a person who has reached the age of eighteen can give an effective consent to all kinds of conduct unless he or she suffers from a mental incapacity known to the defendant. A minor, however, "acquires the capacity to consent to different kinds of invasions and conduct at different stages in his [or her] development. Capacity exists when the minor has the ability of the average person to understand and weigh the risks and benefits."[23] This same analysis also applies to the defense that the student knew the risks of a certain activity and chose to engage in it nonetheless—the assumption of risk defense.

Summary—Unprotected Conduct

Volunteers are not shielded from liability for harm that results from their criminal or other willful misconduct. In addition, volunteers should presume that they are not shielded from liability for harm that results from intentional torts.

What Does the VPA's Protection Mean for Volunteers?

The VPA provides that no qualified volunteer *shall be liable* for harm caused by conduct protected by the VPA. Volunteers should know what this protection means in real terms. Although the VPA may have the practical effect of discouraging a person injured by a volunteer from filing suit, it does not *legally prevent* the filing of such a suit. Statements to the effect that the VPA protects volunteers *from suit* are therefore misleading. Furthermore, the VPA does not grant immunity to volunteers. Immunity would allow a volunteer who is sued to immediately assert that he or she cannot be sued, and the court would determine whether this assertion had merit before trial; if immunity is found to exist, there would be no trial. The assertion that a volunteer cannot be held liable under certain circumstances, however, does not seem to carry the same legal implication as an immunity assertion would: Liability is a matter determined through trial; it is not, like immunity, a matter that may preclude trial.

If a volunteer is sued for harm caused by conduct protected by the VPA, he or she cannot be held liable. There is, however, much conduct that is *not* protected by the VPA and for which volunteers *can* be held liable. Even in these cases, though, the VPA provides some modicum of protection. For example, under the VPA, punitive damages may not be awarded against a volunteer unless the claimant establishes *by clear and convincing evidence* that the harm caused by the volunteer was proximately caused by willful or criminal misconduct or by a conscious, flagrant indifference to the rights or safety of the claimant.[24] In a civil action the usual standard of proof that a claimant is required to meet is a *preponderance of the evidence*—that is, the claimant must show that the state of affairs that he or she claims exists is more likely than not the true one. The clear and convincing standard is a heightened burden that, although susceptible of no specific definition, probably requires a finding that the truth of the claimant's contentions is "highly probable."[25] What this means is that although a volunteer could be held liable for actual damages on a showing that his or her harmful conduct was more likely than not willful, punitive damages could not be awarded without a higher showing.

EXAMPLE 5 *A volunteer hall monitor grabs a student's arm to stop him from running. The student suffers a broken arm. The student sues the volunteer, seeking both compensatory (actual) damages to cover the harm suffered and punitive damages. The student testifies that the volunteer had frequently singled him out for reprimand during transition periods between classes, often unfairly. The student also presents witnesses who testify that they sometimes saw the volunteer looking at the student in what they called a "hostile" way. One witness testifies that on the day the volunteer grabbed the student's arm, she heard the volunteer say that he intended to really "crack down" on one troublemaker in particular.*

The volunteer testifies that he did not seek to harm the student. Several students, the volunteer stated, were frequently disorderly in the halls and he had felt obliged to reprimand them; yes, said the volunteer, the injured student was one of them. On the day in question, however, he says he was not attempting to stop the student to maintain order in the halls but was instead acting to prevent the student from running into and slipping on a puddle of water in the hallway.

After hearing all of the evidence, the jury determines that there is a 51 percent chance that the student's account of the facts is true and only a 49 percent chance that the volunteer's version is true. They thus award the student compensatory damages. Based on their estimation of the likelihood of the student's version they cannot, however, award punitive damages.

In addition to limiting punitive damage awards against volunteers, the VPA also limits potential liability for *noneconomic losses*—those resulting from physical and emotional pain and suffering; inconvenience; physical impairment; mental anguish; disfigurement; loss of enjoyment of life; loss of society and companionship; loss of consortium; injury to reputation; and other losses of a nonpecuniary nature.[26] In a suit where more than one defendant is a volunteer, the VPA limits the amount of noneconomic loss each volunteer can be ordered to pay in direct proportion to the percentage of responsibility that volunteer bore for the harm.[27] This is a deviation from the normal North Carolina rule of damage awards that allows joint and several liability, where any one of multiple defendants can be ordered to pay the full amount of an award. The VPA does not similarly limit a volunteer's potential liability for *economic damages*, however. Economic damages are pecuniary losses, including the loss of earnings or other employment-related benefits, medical expenses, burial costs, and loss of future earning capacity.[28]

Chapter Summary

Despite the fact that the VPA now makes public school volunteers less vulnerable to lawsuits than they were in the past, volunteers still need to pay attention to how they perform their roles—and still need to know exactly what their roles entail. In addition, if the school in which a particular volunteer performs service (or the school board governing that school) has not developed an official policy governing the use of volunteers in the school, the volunteer needs to ask certain questions to ensure that the cost of benevolence does not become too high and that the risks of performing volunteer service in a given context are fully understood. Administrators should, at a minimum, be prepared to answer the following questions from volunteers:

1. Does the school board have a liability policy that covers me, and if so, what are the limits on the coverage?
2. If the school board's liability policy does not cover me, will the school board indemnify me for costs and damage awards if legal action is brought against me? If so, in what circumstances?
3. What qualifications is the school looking for in the volunteer who fills this position? Do I need specific training to perform the duties? If so, does the school provide it?
4. What is the basic position description? What are the specific responsibilities of the position, and what activities are beyond its scope? Who is my supervisor? Under what conditions will I be performing this service? How will I know when I am performing my duties well, as expected, or poorly?

5. Are there things that any volunteer working in a public school should know? Are there certain things I am absolutely prohibited from doing (for example, taking students off campus without permission, using alcohol or drugs before or during service, administering corporal punishment)? Are there other school policies of which I should be aware? What do I do in the case of a medical emergency or fire? How do I handle situations that are physically dangerous to me or others?

Of course, the less risk inherent in a given volunteer position—for example, a bake-sale participant has much less cause for concern than does a volunteer coach—the less necessary precautionary questions may be. What is essential is that the volunteer try to understand the scope of his or her duty and try to perform it reasonably under the circumstances.

If the volunteer works for a school that has an official volunteer policy in place, most of the above questions should be answered during the school's screening and training processes.

Notes

1. 42 U.S.C.A. §§ 14501-5.

2. For this proposition, supporters of the VPA in Congress most frequently cited a 1988 Gallop survey (entitled "Liability Crisis and the Use of Volunteers of Nonprofit Associations"), which showed that one in ten volunteer nonprofit organizations had experienced resignation of volunteers due to liability concerns; that one in six volunteers had withheld service due to fear of exposure to lawsuits; and that slightly fewer than one in ten nonprofits had eliminated programs they believed would expose their organization to lawsuits. *See, e.g.*, 143 CONG. REC. S3819 (daily ed. Apr. 30, 1997) (statement of Sen. Coverdell); *Volunteer Liability Legislation: Hearings on H.R. 911 and H.R. 1167 Before the House of Representatives Committee on the Judiciary* (hereinafter *Hearings*), 105th Cong., 1st Sess. 22 (1997) (prepared Statement of Hon. John Edward Porter, Rep. Illinois); American Society of Association Executives, *Government Affairs Issue Paper Document #30901*, 1 (downloaded from the Internet at http://www.naeb.org.voluntee.htm).

3. Chapter 1, Section 539.10, of the North Carolina General Statutes (hereinafter G.S.) granted volunteers immunity from lawsuits in a very limited set of circumstances. First, for the immunity to apply, the volunteer had to have been providing services under the auspices of a charitable organization. Several kinds of organizations that provided volunteers to public schools fell under the statutory definition of charitable organizations, including PTAs and athletic booster clubs, but the public schools themselves did not qualify as charitable organizations, falling instead into the category of governmental bodies. Thus a volunteer who provided services directly to a school without going through an intermediary charitable organization was not entitled to this statute's qualified immunity. More importantly, however, a fair reading of the statute reveals that it probably did not extend immunity even to cases

of plain negligence, which makes it inconsistent with the VPA. Under G.S. 1-539.10 a volunteer retained immunity only when acting in good faith and providing services that were "reasonable under the circumstances." "Reasonable under the circumstances" is the legal definition of behavior that is not negligent.

4. *Hearings*, 1st Sess. 11, 23 (statement of Hon. Paul Coverdell, Senator from the State of Georgia, and prepared Statement of Hon. John Edward Porter, Representative from the State of Illinois).

5. 42 U.S.C.A. § 14503(a)(1).

6. *Id.* § 14503(a)(2).

7. *Id.* § 14503(a)(4).

8. *Id.* § 14503(f)(1)(E).

9. *Id.* § 14503(a)(3).

10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 212 § 34 (5th ed. 1984).

11. At least one witness at a congressional hearing on the VPA proposed limiting liability for harm caused by simple *and* gross negligence for this very reason. *Hearings*, 1st Sess. 64 (testimony of Charles Tremper, J.D., Ph.D., Senior Vice President, American Association of Homes and Services for the Aging).

12. 42 U.S.C.A. § 14503(a)(3).

13. Crime of violence is defined by 18 U.S.C.A. § 16 (Cum. Supp. 1998) as: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

14. Hate crimes are defined in the notes to 28 U.S.C.A. § 534 (Cum. Supp. 1998), as crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including, where appropriate, the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage, or vandalism of property.

15. 42 U.S.C.A. § 14503(f)(1).

16. International terrorism, as defined at 18 U.S.C.A. § 2331 (Cum. Supp. 1998), means activities that "(a) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (b) appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping; and (c) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."

17. Injury in the traditional sense of the word is not strictly required, although if it is not shown, the plaintiff will recover only nominal damages—for example, damages in the amount of $1.00. Of course, even if the volunteer is not ordered to

recompense the complainant for damage to person or property, legal fees may be a significant expense.

18. The reasonableness of an action may come into the analysis in determining whether the volunteer has a defense, of course. As in the hall monitor case, for example, the volunteer might explain that the student he stopped was running during a fire evacuation, thus threatening severe danger to the orderly evacuation of the building, and that he used only as much force as was necessary to stop her from running.

19. *American Heritage Dictionary*, 3d ed.

20. *See, e.g.*, G.S. 115C-305 ("Appeals to the local board of education or to the superior court shall lie from the decisions of all *school personnel*. . . ."); G.S. 115C-315 (hiring of school personnel); G.S. 115C-318 (liability insurance for nonteaching public school personnel . . . provided that the cost of protection shall be funded from the same source that supports the salaries of these employees); *cf.*, G.S. Art. 23, Employment Benefits (where the term "personnel" is not used once).

21. Just how small this group is depends on the definition of "teacher." Does teacher in this context mean a person who meets all of the state board of education criteria to obtain a teaching position in North Carolina, or does it merely mean a person whose primary responsibility is teaching students? A discussion of this issue is beyond the scope of this book.

22. G.S. 115C-391(a)(3).

23. KEETON ET AL., *supra* note 10, at 115, § 18.

24. Volunteer Protection Act of 1997, 42 U.S.C.A. § 4(e)(1).

25. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE (3d ed. 1984), 960 (citing McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 253–4 (1944)).

26. 42 U.S.C.A. § 14505(3).

27. *Id.* § 14504(b)(1).

28. *Id.* § 14505(1).

2 Direct School Board Liability

THE NEW FEDERAL LAW that provides liability protection to public school volunteers, as discussed in Chapter 1, does not directly affect the potential liability of school boards.[1] A school board must worry about two kinds of liability in managing a volunteer program: *direct liability* and *vicarious liability*. A school board may be *directly* liable when its own negligence is to blame for an injury or, to put it another way, when the board itself can be said to be a wrongdoer. For example, if a board breaches its duty to keep school premises reasonably safe and this breach causes injury to a volunteer, the board could be directly liable to that volunteer. A school board may be *vicariously* liable, on the other hand, merely by virtue of its relationship to the wrongdoer; the board need not have direct involvement in causing the injury. For example, the board might be held liable to a volunteer who is injured when a science teacher, an employee of the board, accidentally spills a caustic solution on the volunteer's skin. The negligence of its employee could render the board vicariously liable. Chapter 3 will address vicarious liability. The focus of this chapter is direct board liability.

No liability may be imposed—be it direct or vicarious—where *sovereign immunity* applies. Under North Carolina's doctrine of sovereign immunity (also known as *governmental immunity*), a governmental body such as a school board may not be sued for harm resulting from its own negligence or from the negligence of its officers or employees if the negligence occurred during the performance of a governmental function.[2] A school board may waive this immunity and thus consent to suit, however, simply by purchasing liability insurance.[3] The purchase of liability insurance waives immunity only for the *kind* of claims covered by the policy and only up to the *amount* of coverage the policy provides. For example, if a student riding a school bus is injured because of the driver's negligence in failing to maintain order on the bus, and if the board's policy excludes coverage for injuries arising out of the operation of a motor vehicle, the board retains immunity from that student's suit.[4] If a school employee causes damages to someone in the amount of $50,000 but the board's policy provides coverage of only $20,000, the injured person can receive only $20,000. Also, if the board has insurance covering only damages of more than $1,000,000, and if the plaintiff alleges damages of only $45,000, the board is immune from suit.[5]

Most, if not all, North Carolina school boards have purchased liability insurance covering some kinds of injury and have thus waived their sovereign immunity.[6] The discussion below and in Chapter 3 assumes that sovereign immunity does not bar suit in a given case.

Every school board has a duty to keep its school premises in reasonably safe condition. This duty has two components. First, the board is obligated to keep the physical condition of its schools reasonably safe, and, second, it is required to guard against foreseeable danger posed by people at its schools. Because of this duty, the board may be held directly liable for an injury that a volunteer suffers because of an unsafe physical condition on school premises or for harm that a volunteer suffers at the hands of an individual who should have been kept away from the school. In the same vein, if a volunteer injures school personnel or students, the school board may be held directly liable if, as it turns out, the volunteer should never have been allowed onto the premises in the first place.

Unsafe Conditions on School Premises

The school board, as the owner of school property,[7] has a duty to keep school premises reasonably safe.[8] The board owes this duty to all persons on school premises (except trespassers), so the presence of volunteers imposes no greater duty on school boards to maintain safe premises than already exists. For this reason, the discussion below will only briefly sketch the outlines of the issue.[9]

Unsafe Physical Conditions

A volunteer reading assistant breaks her wrist when she trips over a door sill that has come loose. Assuming that the school board has waived its immunity (as will be assumed in all the following examples), may the board be held liable for this harm?

To impose liability on the board, a court would have to find that (1) the condition was a dangerous one, (2) the board knew about it or should have known about it, and (3) the volunteer did not know about it and could not have been expected to know about it. These elements are required in all unsafe conditions cases.

Element 1: Dangerous conditions

Determining the existence of dangerous conditions requires analyzing previous experiences with the source of danger.

EXAMPLE 1 *A volunteer giving a presentation to a social studies class suffers a seizure due to an allergic reaction to a chemical used to clean the school's floors. The school is filled with hundreds of people every day, none of whom has exhibited a similar reaction to the solution. The board prob-*

ably would not be liable to the volunteer for any injury she suffered as a result of the seizure, because the use of the floor-cleaning chemical probably was not in itself a dangerous condition.

Element 2: Level of board knowledge regarding the condition

The North Carolina General Statutes charge the board with responsibility for keeping all school buildings in good repair[10] (and, to this end, with ensuring that employees in schools make periodic inspections of their facilities and report any unsafe conditions to the board).[11] If an unsafe condition *could have been* discovered in the course of a reasonable inspection, the board will probably be held liable even if it was not actually aware of the condition.

The board is responsible, however, only for those unsafe conditions that can be discovered through reasonable inspection. It does not have a duty to find and warn of every possible source of injury—only those that are reasonably foreseeable.

EXAMPLE 2 *An opera singer volunteers to come to music class for a brief performance. During her aria she reaches a particularly high note, and the glass in a nearby window shatters, cutting her arms and hands. The board probably would not be held liable for this injury because the susceptibility of the glass to breakage under these conditions probably could not have been revealed in a reasonable inspection.*

Element 3: Extent of volunteer's knowledge about the condition

Even if the condition is one about which the board knew or should have known, the board will not be held liable unless the condition was unknown to, or not to be anticipated by, the volunteer. Put another way, the board does not have a duty to warn of dangerous conditions that are obvious or those about which a volunteer already knows.

EXAMPLE 3 *A volunteer softball coach notices that during practices the ball often takes erratic leaps due to the very bumpy surface of the field. She asks school officials to allow her to use another field, but they deny her request. Later in the season the volunteer loses several teeth when a grounder bounces off a bump in the field and hits her in the mouth. The volunteer probably would not have a claim against the board because she knew that the field was dangerously bumpy and could have anticipated such an injury but continued to practice there anyway.*[12]

Consider the three elements of unsafe condition cases as applied to the loose door sill example, above. (1) Was the loose door sill dangerous or not? If the sill had been loose for four years and not one person had tripped over it until the volunteer did, it probably was not dangerous. On the other hand, if several school employees had tripped over it and suffered some injury, it probably was. (2) Could the board reasonably have been expected to know about the condition of the door sill? If several people had tripped over this door sill during the last month, the board could be presumed to have known about it; a reasonable inspection would have revealed the defective sill. In addition, the knowledge of school staff members about the door sill—from having stumbled upon it themselves—may reasonably be attributed to the board. On the other hand, if the door sill had come loose immediately before the volunteer tripped over it, a reasonable inspection probably would not yet have revealed it and the board would not be held to have known about it. (3) Did the volunteer know about it? Maybe the volunteer knew or should have known about the sill. If the board can show that the volunteer had been warned about the door sill during her orientation or that she had tripped over it twice in the past without serious injury, a court probably would find that she knew of the condition. Whether or not the board is liable, then, depends on the circumstances.

In conclusion, the board owes a duty to volunteers (and to virtually everybody else) to keep school buildings and grounds in reasonably safe physical condition. Premises must be inspected on a regular basis, and when hazards are found they must be repaired immediately or steps must be taken to keep people away from them until repairs can be completed.

Unsafe Conditions Caused by Persons

EXAMPLE 4 *A volunteer supervising recess on the school playground is injured when an apartment dweller on the adjoining property throws a metal object out of her window. Could the board be held liable for harm the volunteer suffered because of the neighbor's action?*[13]

The board's obligation to keep school premises safe encompasses a duty to prevent reasonably foreseeable injury from *human* sources as well as from physical conditions. This does not mean that the board will necessarily be held liable for the independent actions of third parties. As a general rule, the board is entitled to rely on the presumption that people will behave in a reasonably civilized manner—unless there is a foreseeable reason to expect otherwise. Where risk *is* reasonably foreseeable, the board has a duty to warn of it or otherwise protect against it.

When is the risk reasonably foreseeable? Harm to persons on school premises that is caused by third parties may be foreseeable because of a pattern of similar behavior within the relevant past.

EXAMPLE 5 *Several volunteers have been attacked by knife-wielding muggers on school property within the last few months. The fourth volunteer attacked brings suit against the board, alleging that it negligently failed to warn her about the danger or to take security measures that were reason-*

ably necessary to prevent the attacks. The board probably will be held liable. It probably should have known that another attack was likely under the circumstances.[14]

EXAMPLE 6 *A high school student has a history of seriously threatening volunteers. On one occasion he attacked a volunteer and broke her glasses. The board probably has a duty to warn the next volunteer who works with that student about his aggressive tendencies.*[15]

So, then, would the board be liable to the volunteer monitor injured by the object thrown from an apartment adjacent to the playground in Example 4? It seems clear that throwing a metal object from some height constitutes a dangerous activity. If the apartment dwellers had thrown objects out of their windows on past occasions, injuring school personnel or students, then the board should be held accountable for knowing about the condition. The board would then be liable to the injured volunteer, unless, of course, the volunteer was also aware of the danger. That would be true, perhaps, if she were at the school every day and had been privy to a general warning issued to all persons in the school or if the dangerous part of the playground were strewn with litter that clearly came from the neighbors.

When a given context or situation entails inherent risk of some kind, risk of third-party harm is foreseeable in some cases even where there is no pattern of behavior on which to base the prediction. Such risks might come from dangerous tools or instrumentalities—automobiles or other nonhuman agents of risk—or from the vulnerability of the people participating in a situation.

EXAMPLE 7 *Each year the shop class includes a unit on the use of power tools. The board approves the hiring of a shop teacher who has no experience with power tools. During one of the power tool sessions a volunteer assistant is injured when the teacher incorrectly uses the band saw. Because the shop class involves the use of dangerous tools, the board should have realized the risk of placing an inexperienced teacher in the position.*

EXAMPLE 8 *The principal of a public elementary school initiates a mentoring program, with board approval, for "at risk" students in the third grade. Mentors are approved simply on the basis of their membership in a local church or civic group. Mentors meet alone with their individual students off school premises after school hours. The principal does no follow-up on the mentor-student relationships. The board should know that allowing vulnerable children to spend unsupervised time with persons whose appropriateness for mentoring has not been investigated poses a risk of serious harm to those children. If a mentor abuses a child in some way, the board would probably be held liable.*

When a situation entails inherent risk, the board must take reasonable steps to make sure that persons who will be involved in those situations have the qualities—both personal and professional—necessary to behave appropriately and reasonably safely in them.

Negligent Employment

EXAMPLE 9 *A school board hires a teacher without calling his references, one of whom is a former employer. During class this teacher calls out to his volunteer classroom assistant, "Hey sexy mama, bring that pretty little figure of yours over here and help this student." The volunteer requests that the teacher refrain from using such language, but he persists and, during the next class, he places his hand on her buttocks. At the end of the school day, when the volunteer approaches the teacher to voice her strong displeasure with his behavior, he grabs her around the waist and kisses her despite her obvious lack of consent. The volunteer sues the board for negligent employment and presents evidence that the teacher was fired from his former position for sexual harassment of his female colleagues. Will the board be held liable?*

Every school board has a duty to take reasonable steps to determine that the individuals it employs[16] in its schools are qualified for the roles they will play and that they remain qualified once they are employed. Screening applicants for employment serves the former purpose, supervising employees serves the latter. Failure to reasonably screen or reasonably supervise an employee, or negligence in retaining an employee will, for our purposes, be called "negligent employment." Although in Example 9 the volunteer is suing the board for negligent employment of a *paid employee*, the board's duty to exercise reasonable care in employing school personnel probably applies to volunteers, too. This issue is discussed below, under the heading "Negligent Employment of Volunteers."

To prove that a school board negligently employed an employee, a claimant must show that (1) the employee was unfit or incompetent, (2) the board knew or should have known of this incompetence, and (3) the injury alleged was caused by this incompetence.[17]

Negligent Employment of Paid Employees

At the most general level, an employer's investigation, supervision, or retention of an employee is not negligent if a reasonable person in similar circumstances would have behaved the same way. While an employer is generally entitled to presume that a prospective or current employee is competent to perform simple tasks (and thus the employer has only a minimal duty to investigate or supervise), the duty to investigate and supervise increases when the task or position poses a serious risk of harm to third parties.[18]

Proving a case of negligent employment is difficult. North Carolina courts are "noteworthy for their rejection of negligent hiring claims"[19] and begin with the presumption that the employer has used due care in hiring its employees.[20] Further, the standard of care to which state courts have held employers is relatively easy to satisfy.

The leading negligent employment case in North Carolina involved a school board, and it illustrates this fairly forgiving standard of care. In the case a student was allegedly sexually molested by her principal, Vann J. Bass. The student's parents filed suit, charging that the board was negligent in the selection process that lead to the board's decision to hire Bass. The court found that, at the time it hired Bass, the board did not know, and reasonably could not have been expected to know, that Bass had left his former job because of a similar allegation. Two of Bass's references were administrators from his former school system, and neither expressed any reservations concerning his appropriateness for the job. And when the hiring school system called a third reference to investigate a rumor about "his sexuality," this reference gave no indication of the earlier charge. This investigation followed usual board policy, the court held, and was reasonable.[21]

The *Bass* opinion is notable for what it did not require of the hiring board. Bass's application indicated that he had left his former position because of "health" reasons, yet there is no indication that the board asked him to explain this (even though he had worked in the former school system for ten years and sought his new position just over six months after leaving the old one). In addition, the board hired Bass before it received even one complete reference.[22]

In sum, the inference that can be drawn from this case is that it is reasonable to rely on the representations of an applicant's references.[23] Standards for pre-employment investigations distilled from other North Carolina negligent employment cases—not involving school boards—are also fairly forgiving. For one thing, courts have held that there is no duty to check an applicant's criminal records[24] (although school boards are statutorily authorized to do so in certain circumstances).[25] As a related point, it has also been ruled to be within the bounds of reasonable care for an employer to rely on an applicant's representations about his or her criminal history, if any.[26] More broadly, an investigation is probably reasonable if it complies with the practices of similar employers.[27]

The already difficult job of proving a negligent employment case against a school system may be made even more difficult when an injured adult volunteer happens to be the one making the claim. The reason for this difficulty relates to the public schools' primary mission of educating children: a school system's investigation of employment applicants and its supervision of current employees places reasonable focus on those qualities that are necessary for dealing well with children. Most of the risk of harm inherent in any public school job arises from the presence of children, some of them disabled, who are more vulnerable to injury than are adults. If an employee is unqualified for his or her job, it is a child—more particularly, a child's education—who will suffer; if an employee is dangerous, it is, again, most likely to be a child—quite probably a younger or disabled child—who will suffer maltreatment. Thus it is to students that a school board owes its greatest duty to screen and supervise persons employed in its schools; as seen in the *Bass* case, however, this duty is actually not so great. Therefore the board's duty to volunteers and other adults in regard to screening and supervising employees is probably quite minimal, and volunteers will have a difficult time showing that the board breached a duty to them.

EXAMPLE 10 *In screening an applicant for employment as a second-grade teacher, a school system conducts a criminal history check, looking for convictions for certain crimes that it has determined pose particular dangers to students. The check comes back clean. The school system also checks the applicant's references and certification, and everything seems to be in order. None of these methods turns up the fact that the applicant has a judgment against him for slandering a co-worker. The teacher later slanders a volunteer, who then brings suit against the school board for negligent employment. The volunteer probably will not prevail. The board's investigation of the teacher seems to have been conducted reasonably. It focused on qualities relevant to his teaching ability and his appropriateness to work with children. Further, it is not entirely clear that a seeming tendency to slander makes a teacher unfit for employment.*

In sum, a screening may be fully reasonable under the circumstances and still not reveal qualities that pose an unreasonable danger to a volunteer or other adult.

Nonetheless, the board does have a duty to keep school premises reasonably safe, and on this basis a claim of negligent employment can be made. So, would the board be held liable to the volunteer classroom assistant in Example 9 who was sexually harassed by the math teacher who called her "sexy mama"? Engaging in sexual harassment, it may be argued with some force, makes a person unqualified for employment in the public schools. Teachers are role models for their students. Certainly if the board knew that this teacher had a history of sexual harassment, it could reasonably predict that he might sexually harass someone on school premises. On the other hand, if the teacher had indicated in the selection process that there were no factors that might impede his ability to teach in the public schools, the board would presumably be entitled to rely on this representation. And, if the board had called his reference and this person had given an unqualified endorsement, the board would be entitled to rely on this representation as well. It is an open question whether the board's failure to check the teacher's references was negligent in the face of evidence that the references would not have revealed the negative information.[28]

Negligent Employment of Volunteers

EXAMPLE 11 *A student is injured in an automobile accident while being driven by a volunteer to a statewide drama competition. Subsequent investigation reveals that the volunteer's license had been revoked two months earlier for driving while intoxicated. Does the student have a claim against her school system for negligent employment? After all, the person negligently "employed" in this case is not an employee, but a volunteer.*

Many questions arise from the "nonemployee" status of volunteers, the most obvious of which is whether a school system has a duty to exercise due care in selecting and supervising them. Assuming there is such a duty, who, or what body, is obligated to fulfill it? Finally, what is reasonable or not negligent in terms of fulfilling this duty?

Is there a duty to screen and supervise volunteers? Yes. There is a duty to screen applicants for volunteer positions and then to supervise them once they are in the schools. Although research for this publication has uncovered no reported cases holding a school board liable for negligent employment of a volunteer, this absence of cases is probably attributable to the protection of sovereign immunity and to sheer luck. At least one court has expressly acknowledged the propriety of such an action against a school board, however.[29] In that case a student from one school district, staying with a host family in another school district, was seriously injured in an accident that occurred while she was riding in the host family's car. The student brought suit against her home school district alleging, among other things, that it had been negligent in selecting host families. The court found that the home district's liability could not be predicated on its failure to properly select host families, because it appeared to have taken no role in selecting them. However, the court said, the home district *could* be held liable for its failure to ask what criteria the host district used in selection. That is, the home district could be held liable for its negligence in blindly entrusting the selection of host families to the host district.

Many nonschool organizations who use volunteers to work with children—such as the Boy Scouts,[30] the Big Brother/Big Sister group,[31] churches,[32] and others[33]—have been sued for negligently selecting their volunteers.

In each of these cases the fact that the volunteer involved was not an "employee"—in the sense of being paid for his or her services—was not fatal to a negligent employment claim based on harm caused by the volunteer.[34] It is the power to exercise control over a volunteer—not the exchange of wages for service—that is the crucial element, and in this regard a volunteer sufficiently resembles a paid employee to impose a duty on the school board to reasonably investigate and supervise him or her. A volunteer is "working for" the board, or is an agent of the board, insofar as the board is empowered to establish requirements for volunteer service, has the power to dictate what roles a volunteer may perform and how he or she may perform them, and has the authority to ban a volunteer from the school on any legal grounds.[35] So, it would appear that the student injured on the way to the drama competition in Example 11 could, indeed, bring a negligent employment suit against her school district.

Who, or what body, has the duty to screen and supervise volunteers?

EXAMPLE 12 *The friend of a seventh-grade science teacher volunteers to give a lab demonstration to the science class, even though he has no experience with the equipment or the chemicals. In the course of the demonstration he mixes chemicals inappropriately, misreading the experiment's directions, and there is an explosion that severely injures two students. Against whom may these students bring a suit for negligent employment?*

Although nowhere in North Carolina law is a school board made expressly responsible for the selection of volunteers, as it is for employees,[36] the board does have a duty to take reasonable steps to avoid negligently employing unfit or incompetent volunteers. This duty is the same as in the case of paid school personnel.[37] It arises, albeit tacitly, from a board's "general control and supervision of all matters pertaining to the public schools in their respective school administrative units,"[38] from its plenary power to make rules concerning the conduct and duties of personnel[39] and over the hiring and firing of all school personnel, and from its duty to keep school premises reasonably safe.[40]

That the school board is not directly involved in the daily selection or monitoring of volunteers in each of its schools does not lessen the force of this conclusion. The school board is not involved in the daily inspection of school premises or the supervision of employees, yet it is responsible if something goes awry. A system has been developed in which those who are in direct daily contact with the school building and personnel are obligated to monitor and keep the board informed of problems. The board has a duty to develop and implement a similar system with respect to volunteers.

In Example 12, concerning the science teacher's friend, the board might or might not be held liable for negligent employment of the careless volunteer. If the board had no policy concerning the use of volunteers in its schools, and if the absence of such a policy led to the presence of an incompetent or dangerous volunteer in the science class, then it could be held liable. Similarly, if the board had developed a policy outlining requirements for screening and supervising school volunteers but then failed to require schools to implement it, it could probably be held liable. The development of the policy could be used as evidence that the board knew what steps were reasonable to take but then failed to take them. If the board had a reasonable policy and required schools to use it, but the failure of one person at the school level (the teacher who issued the invitation to his friend) to use it was responsible for the presence of the dangerous science class volunteer, then the board probably would not be liable (at least directly).

What is the duty to screen and supervise volunteers? There is a duty to screen and supervise volunteers and it ultimately rests with the board. But the precise nature of that duty is difficult to determine because of the absence of court cases directly on point, the lack of a legislative statement on the issue, and the complex ways public schools use volunteers. Volunteers in the public schools in some instances perform duties similar to those of public school employees, while in other instances they more closely resemble volunteers in nonschool, youth-serving organizations, such as Big Brothers/Big Sisters or the Boy Scouts.

Youth-serving organizations screen prospective employees and volunteers based on the requirements of a given job. In the best of circumstances, these requirements are set out in a job description. Job descriptions serve several functions, the primary function being the clarification of the expectations for each position—its responsibilities, the setting in which it takes place, the number of students with whom the volunteer will work, when the service is to be performed, and the amount of supervision and training provided. This process, in turn, makes clearer the risks inherent in each position as well as the qualifications a volunteer must possess to be fit or competent to perform it. With this information in hand, determining what screening mechanisms and what degree of supervision are appropriate for a given position becomes easier.

School boards typically do not have job descriptions for volunteers, and this shortfall can lead to the selection and retention of volunteers whose qualities are not well-suited—or are even dangerous—for their roles. In fact, the lack of job descriptions can lead to a failure to screen altogether. Even when volunteers are screened, the lack of role definition may cause volunteers to perform duties that are, or should be, beyond the scope of their roles, potentially leading to harm.

EXAMPLE 13 *A volunteer originally taken on as a reading assistant occasionally acts as a classroom supervisor when the teacher is called out of the room. One day a fight breaks out between four students, and the volunteer sprays one of them with Mace. Were reasonable measures taken to determine whether this volunteer was qualified for her role—either personally or professionally?*

Assume that in this example the volunteer was screened for the role of reading assistant. A reasonable screening in this case would begin with a determination of whether the prospective volunteer possessed any qualities that would automatically disqualify her from working with children. The next step would entail assessing whether her reading and teaching abilities were up to the role and determining how well she worked one-on-one with students. It would not necessarily be reasonable, as it would be if the volunteer had applied for a role as a classroom supervisor, for example, to investigate her experience working with large groups of children, her disciplinary style, or her ability to maintain control in a classroom situation. If the volunteer's role had included classroom supervision, and if an appropriate screening for that position had been done, the investigator might have discovered that the volunteer had some kind of panic disorder or had been the victim of several gang attacks. Such red flags might not have appeared in the screening for the role of reading assistant.

Specifying the duties of each volunteer position is an affirmative (and reasonable) recognition of the fact that volunteers play a variety of roles within the public school system and that the level of screening and supervision must intensify as the degree of risk associated with a position increases.

Nonschool organizations who regularly use volunteers have identified various risk factors that might be present in a given job position and that would justify an intensified screening or heightened supervision. For public school volunteer jobs, such risk factors include:

- the position is one that requires the volunteer to have unsupervised contact with students, especially young, disabled, or otherwise particularly vulnerable students;
- the volunteer is required to help students with personal activities, such as changing clothes or going to the bathroom;
- the volunteer has access to confidential student information;
- the volunteer will use dangerous machinery or other instruments, such as cars or power tools;
- the volunteer handles school funds or valuable property;
- the position requires extreme physical exertion;
- the volunteer will have regular physical contact with students such as might occur when coaching sports or delivering health-care services.[41]

Volunteers play roles in public school programs that may involve considerable risk. Some volunteer positions, such as bake-sale assistant or photocopier, involve no unsupervised contact with students, require little technical skill, and entail a correspondingly small risk of serious harm to any student. More risk may be involved in an activity such as driving students to school events, which combines the use of a dangerous instrumentality (the car) with unsupervised student contact. Depending on the number of students in the car and their age and vulnerability, the risk of harm may be more or less serious. At an even higher risk level are volunteer jobs such as coaching sports. Coaching may require both technical know-how and some knowledge of first-aid techniques; it also usually involves regular physical contact with students, possibly at times when students may not be fully clothed (i.e., in the locker room). The volunteer positions in the public schools that carry the highest risks of serious harm are positions such as chaperone and mentor. These positions involve solitary, unsupervised contact with a student or students, generally off school premises, over a longer period of time.

Even if a school board has not developed formal job descriptions to help identify risks posed by volunteer positions, it can still identify certain characteristics that make a volunteer inherently unfit for any role in the public school: a history of, or tendency toward, child molestation, for example, or observable prejudice against ethnic minorities. Boards should make clear just what characteristics will automatically disqualify a volunteer candidate.

Not every problem that a potential volunteer may have is as disquieting as child molestation or bigotry, of course. Determining whether a volunteer is fit and competent for a given role requires knowledge of the risks and responsibilities of that role. Fitness may turn on personal or moral qualities, while competence may turn on professional and technical skills. For example, to be fit for the position of hall monitor or classroom supervisor, a volunteer might need certain attitudes concerning discipline; competence in this case might amount to a commanding physical presence. A volunteer playground assistant may have to be at ease with children and free of any physical limitations. A volunteer mentor must demonstrate fitness for the job primarily through personal qualities. He or she might be screened for drug or alcohol use, family history, temperament, interests and hobbies, and employment history. On the other hand, if a volunteer applies for the math tutoring program, professional or technical qualities such as education, previous experience, and relevant training are likely more important.

Once the board has developed descriptions that include identified risk factors and desired qualifications for volunteer positions, it must implement a system for investigating potential volunteers, for placing the appropriate volunteers in the appropriate roles, and for supervising their activities. The reasonableness of using any particular method of investigation or supervision will be judged, in part, on its availability and cost.

What is reasonable under the circumstances? Today most school boards have no policy at all on screening and supervising volunteers, despite the use of volunteers in positions that present obvious risks to students. There is no statute or state board of education regulation preventing school systems from setting up mentor-student relationships between their students and any volunteer who walks in off the street (assuming parental consent), but this lack of care in screening and supervising volunteers would constitute negligence.

Is it reasonable, then, for boards to require less screening for or supervision of volunteers than they require for employees? Or should boards, at times, require that volunteers be subject to more stringent screening and supervisory requirements than employees? Because the duty to investigate and supervise a volunteer corresponds to the risks inherent in the position he or she fills, the answer to each of these questions is yes.

Some volunteers perform essentially risk-free jobs: the parent who hands out programs at the talent show, the bake-sale assistant, the person who helps make copies in the office, the one-time speaker at a general assembly. For these roles, a perfectly reasonable investigation may consist simply of a brief chat with the volunteer, letting him or her know any pertinent school rules and then sending him or her off to work.

Other positions, such as one-on-one tutors or sick room volunteers, entail more or less risk, depending on the amount of supervision the volunteer receives. For these positions, three screening devices would be reasonable: (1) an application (on which the volunteer might be required to sign a pledge indicating that he or she has never been convicted of a crime involving drugs, sex, or violence; has no history of child molestation; does not use illegal drugs or abuse alcohol; and has not been substantiated by social services officials for child abuse, neglect, or domestic violence); (2) an interview; and (3) reference checks. When a volunteer role requires driving students or school personnel, driving and insurance records should be checked (see Chapter 4). Technical skills relevant to any volunteer position should, of course, be investigated as well.

Aside from driving records, the procurement of which costs something, none of these investigative procedures requires the direct expenditure of money, and all are available to schools with the volunteer's consent. In other words, it seems reasonable for a board to require their use.[42]

But volunteers who are recruited for positions in which they have direct contact with students and receive little or no supervision from school personnel, such as mentors and overnight chaperones, must be more carefully screened than other volunteers and, in fact, could reasonably be subject to more careful screening than school employees.

EXAMPLE 14 *Over the course of a year, a volunteer mentor sexually abuses his student. The student sues the school board for negligent employment of the volunteer. During the trial, evidence reveals that the mentor was subject to the same screening as were teachers employed in the district. Evi-*

dence also shows that the mentor was never required to check in with the school and that no effort was made to assess the progress of the mentoring relationship. Did the school's screening and supervision of the mentor amount to negligence?

No screening process can ever completely verify that a volunteer is an appropriate and safe individual for a given position, thus some supervision is clearly called for in a risky situation like mentoring. The failure to supervise the mentor at all was clearly unreasonable, no matter how reasonable the initial screening. The reasonableness of the initial screening itself is harder to assess, however. Mentors and teachers share some similar duties, but other factors may actually make the mentor role more risky than the teacher role. The mentor comes, presumably, with no assurance of professional training (no teacher certification, for example) and no school system references. Further, the mentor does not depend on good performance evaluations for a paycheck. Finally, the mentor probably spends more solitary time with the student than does a teacher, and more time off campus with the student. So, even if the teacher was not subject to a criminal history check upon hiring, it might be prudent to subject the volunteer to one. If the student will be spending time with the mentor's family, it might be prudent to do a home visit. The greater risks of the mentor position justify a more extensive screening process.

For volunteer positions such as mentoring, the tools used by boards to screen employees may not be sufficient—especially in those districts where the board does not have a policy of checking the criminal history of applicants for employment. A more reasonable approach might be to rely on mechanisms used by other youth-serving organizations with volunteers in mentoring positions—organizations like the Boy Scouts or the Girl Scouts or Big Brothers/Big Sisters. The screening conducted by these organizations include psychological profiles, criminal record checks, and home visits for their volunteers. Such mechanisms are available to school boards.[43] They do cost money, however, and their cost in terms of time and human resources can be great. On the other hand, it seems likely that only a small subset of volunteers will work in positions where such checks are warranted.

Appropriate screening is the first step; appropriate supervision, the second. Supervisory methods must be designed to address the fact that most of the work done by volunteers in these kinds of positions occurs off school premises. It may be necessary, for instance, to require that volunteers keep notes of meetings with students and that they come in periodically for meetings with school personnel.

For high-risk volunteer positions, it may well be that the cost of conducting screening and supervision is too high. If this is the case, the board needs to make a judgment about whether allowing volunteers to perform these roles with less rigorous screening and supervision creates unreasonable risk. It may be that schools are just not equipped to exercise the degree of care necessary to use such volunteers with reasonable safety. These volunteers may still be available to the public schools through an organization that is equipped to screen and supervise them thoroughly (such as the organizations discussed above). The school board must still, however, exercise due care to ascertain that its chosen organization charged with such oversight does use reasonable screening and supervisory methods.

Chapter Summary

The use of volunteers in the public schools raises serious liability concerns for school boards. A volunteer suffering harm during school service is less likely to be a liability risk; a volunteer inflicting harm during school service is a much greater concern. In fact, school boards across the state have left themselves wide open to liability by failing to develop and implement any sort of policies concerning the screening and supervision of volunteers.

Of course, this lack of policies allows for the unabated continuation of serious risks of harm—a state of affairs much more disturbing than any potential liability.

Notes

1. The Volunteer Protection Act (VPA) of 1997's language provides: "Nothing in this section (limiting liability for volunteers) shall be construed to effect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person." 42 U.S.C.A. § 14503(c). *But see* chap. 3, pp. 52–53, for a discussion of possible indirect effects of the VPA on school board liability.

2. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994). The distinction between governmental and proprietary functions, as well as other niceties of sovereign immunity, will not be discussed here. North Carolina courts addressing the school board immunity issue have consistently operated on the premise that the board is engaged in a governmental activity and cloaked by immunity (unless consent to suit was given). *See, e.g.*, Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Overcash v. Statesville City Bd. of Educ., 83 N.C. App. 21, 348 S.E.2d, 524 (1986). For our purposes, the essential point is to note the existence of this barrier to liability and to move on to address the potential for liability when it has been waived.

3. Chapter 115C, Sections 42 and 47(25), of the North Carolina General Statutes (hereinafter G.S.).

4. Vester v. Nash/Rocky Mount Bd. of Educ., 124 N.C. App. 400, 477 S.E.2d 246 (1996).

5. Hallman v. Charlotte-Mecklenberg Bd. of Educ., 124 N.C. App. 435, 477 S.E.2d 179 (1996).

6. At the time of this writing, the effect of the North Carolina School Boards Association's trust policies on the waiver issue is an open question.

7. G.S. 115C-40.

8. G.S. 115C-524(b). *See also* Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998), *reh'g denied*, No. 216A98 (N.C. Mar. 3, 1999).

9. For more details, *see* 57 AM. JUR. 2D *Municipal, etc., Tort Liability* §§ 551–71; Douglas S. Punger, "Tort Liability," in *Education Law In North Carolina*, Janine M. Murphy and Robert E. Phay, eds. (Chapel Hill, N.C.: Principals Executive Program, The University of North Carolina at Chapel Hill, 1997), 32-22 through -24.

10. G.S. 115C-524(b).

11. *See, e.g.*, G.S. 115C-523.

12. *See* Daniel v. City of Morganton, 125 N.C. App. 47, 479 S.E.2d 263 (1997), on which Example 3 is based.

13. Facts taken from the case of *Rubino v. City of New York*, 498 N.Y.S.2d 831 (App. Div. 1986).

14. *See, e.g.*, Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981) (evidence of thirty-one criminal incidents at a shopping mall within a one-year period raises a genuine issue as to whether an assault on a mall patron was reasonably foreseeable). *Compare* Brown v. North Carolina Wesleyan College, 65 N.C. App. 579, 309 S.E.2d 701 (1983) (murder of student not reasonably foreseeable based on evidence of a break-in ten years earlier, a vending machine break-in five years earlier, and an attempted rape three years earlier).

15. *See, e.g.*, Ferraro v. Board of Educ. of N.Y., 212 N.Y.S.2d 615, *aff'd*, 221 N.Y.S.2d 279 (App. Div. 1961) (principal had duty to warn substitute teacher about known aggressive tendencies of student).

16. "Employs" in this context is used in a broad sense to mean "putting to use," as opposed to "exchanging wages for labor." Emphasizing the service aspect of the relationship rather than the monetary aspect is consistent with the conclusion that a volunteer may be the subject of a negligent employment suit.

17. Another necessary underlying requirement is that the employee must have engaged in tortious or criminal conduct that caused the volunteer's injury. A court will not hold the board liable unless it makes such a finding. Graham v. Hardee's Food Sys., 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996).

18. Carlsen v. Wackenhut Corp., 868 P.2d 882, 887 (Wash. Ct. App. 1994), *quoting* RESTATEMENT OF AGENCY § 213 (1958).

19. Robert P. Joyce, "Board Liability for Employee Actions," paper presented at annual Institute of Government School Attorneys' Conference, Institute of Government, The University of North Carolina at Chapel Hill, Feb. 7, 1997.

20. Moricle v. Pilkington, 120 N.C. App. 383, 387, 462 S.E.2d 531, 534 (1996); Stanley v. Brooks, 112 N.C. App. 609, 612, 436 S.E.2d 272, 274 (1993), *review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994).

21. Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990).

22. Medlin v. Bass, 96 N.C. App. 410, 386 S.E.2d 80 (1989).

23. This is reasonable, despite the widely acknowledged problem of "passing the trash" within the public schools.

24. *Moricle*, 120 N.C. App. at 387, 462 S.E.2d at 534 (1996); *Stanley*, 112 N.C. App. at 612, 436 S.E.2d at 274 (1993).

25. G.S. 115C-332.

26. *Stanley*, 112 N.C. App. at 613, 436 S.E.2d at 274 (1993).

27. *Moricle*, 120 N.C. App. at 386, 462 S.E.2d at 533 (1996).

28. Medlin v. Bass, 327 N.C. 587, 592, 398 S.E.2d 460, 462 (1990) ("Although Holmes . . . the FCB Superintendent, did not receive the written recommendations until after Bass was hired, it is clear that the recommendations contained no information indicating that Bass was a pedophile").

29. Swearinger v. Fall River Joint Unified Sch. Dist., 212 Cal. Rptr. 400, 408 (Ct. App. 1985). How this case ultimately would have been resolved by a court is not known. The California Supreme Court granted review of the case (701 P.2d 1172 (1985)) but dismissed it at the request of the parties before undertaking review (709 P.2d 430 (1985)). Presumably the case was settled.

30. *See, e.g.*, Infant C. v. Boy Scouts of Am., Inc., 391 S.E.2d 322 (Va. 1990) (jury verdict against local troop for negligently selecting and retaining scout master who molested a scout; troop approved the master before submitting his application for approval by the national branch, which maintained a confidential list of unfit applicants).

31. Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 395 S.E.2d 241 (Ga. Ct. App. 1987) (screening of "big brother" adequate; it consisted of application, three or more references, an extensive interview and assessment by a clinically trained caseworker, completion of a family history, and a personal meeting with the membership committee; organization was not required to do an FBI check, psychological test, or credit check).

32. *See, e.g.*, Broderick v. King's Way, 808 P.2d 1211 (Alaska 1991).

33. *See, e.g.*, L.P. v. Oubre, 547 So. 2d 1320 (La. Ct. App.), *writ denied*, 550 So. 2d 634 (La. 1989) (Boy Scout molested by troop leader sought to hold local volunteer fire department and VFW liable for negligently selecting the leader).

34. "The relation of principal and agent can be created although neither party receives consideration." RESTATEMENT (SECOND) OF AGENCY § 16(b) (1958).

35. Although it may, in fact, be the school principal or other on-site employee who executes these decisions, it is clearly within the board's authority to promulgate rules by which such decisions are governed. The principal or teacher in this case is an agent acting at the board's bidding. Therefore it can be said that the "board" is doing all these things.

36. G.S. 115C-315(b).

37. Commentators on the liability of an organization for negligent selection, supervision, or retention of volunteers seem to agree that the potential for liability with volunteers is essentially the same as it is with paid employees. *See, e.g.*, Lynn Buzzard and Susan Edwards, *Church Hiring Guide* (Cary, N.C.: Baptist State Convention, 1995), § C-3, 52. "Churches must realize that the law does not differentiate between permanent and volunteer workers when considering a negligent hiring suit. The

same standard of care is required from the employer for both." *See also* John C. Patterson, *Staff Screening Tool Kit* (Washington, D.C.: Nonprofit Risk Management Center, 1998), 13–14.

38. G.S. 115C-36, -40. This grant of power authorizes boards to make rules concerning persons working in the schools, to the extent that the rules do not conflict with state or federal law or with state board of education rules.

39. G.S. 115C-47(18).

40. Just as it is reasonably foreseeable that an unqualified or dangerous employee could cause harm, it is reasonably foreseeable that a volunteer of the same ilk could do so. For example, it is probably no more or less likely on any given trip for an unqualified volunteer driver to have an accident than it is for a fully employed, unqualified school bus driver to do so.

41. Adapted from Patterson, *Staff Screening Tool Kit*, 5.

42. Such mechanisms do have some cost, however, in terms of time and human resources—especially in comparison to conducting no screening at all, which is the common current approach. This cost must be balanced against the potential harm that could result from not using the measures.

43. G.S. 114-19.3(a)(10) authorizes providers of treatment for, or services to, children, the elderly, mental health patients, the sick, and the disabled to obtain criminal history checks on applicants for employment. This part of the statute probably authorizes schools to obtain such histories on volunteers in appropriate circumstances. This issue will be discussed at more length in Chapter 4.

3 Vicarious School Board Liability

CHAPTER 2 discussed circumstances in which a school board may be held liable when the board's own negligence or intentional wrongdoing causes harm in a school volunteer program. This chapter examines the circumstances in which a school board may be held liable for harm caused by others—even when the board itself had no involvement in or blameworthiness for the harm. Under the doctrine of *vicarious liability*, the board can be held legally responsible for harm caused by a person who stands in a *master-servant relationship* with the board, so long as the harm occurred within the course and scope of that relationship.

Before getting to the meat of this subject, though, a note on the terminology of vicarious liability is in order. Some relationships between a *principal* and an *agent* lead to vicarious liability, and some do not. The typical kind of principal-agent relationship that does lead to vicarious liability is the relationship between employer and employee, where the employer is the principal, the employee is the agent, and the employer is often held vicariously liable for the negligent harms caused by the employee.

Employer and *employee* are the modern equivalents of the older, common-law terms *master* and *servant*, which might to our contemporary ears have connotations far removed from the employment relationship and from questions of vicarious liability.

This chapter makes use of the terms *master* and *servant* specifically, because at issue is the potential vicarious liability of boards of education for actions of volunteers, who may be *servants* of the board in the master-servant sense but who are not *employees* in the usual sense of that term.

EXAMPLE 1 *A student is injured when, during an in-class demonstration, a science teacher negligently spills a caustic solution on the student's skin. The student sues both the teacher and the school board to recover damages for her injury. Although the board itself had no direct involvement or fault in causing the injury, it can still be held liable (assuming the teacher's conduct is found to be negligent), because it has a master-servant relationship with the teacher and the teacher caused the student's injury during the scope of the teacher's duties.*

As Example 1 shows, the employer-employee relationship is a master-servant relationship for the purposes of vicarious liability and, in fact, is the most common master-servant relationship for which vicarious liability is imposed. It is not, however, the only such relationship. There are strong reasons to believe that a board may be held vicariously liable for harm caused by school *volunteers* in the course of their duties.

After a brief discussion of the fundamentals of vicarious liability, this chapter examines the circumstances in which the relationship between a board and its volunteers may give rise to vicarious liability. It concludes with an examination of defenses a board may assert when alleged to be vicariously liable for volunteer-caused harm.

Vicarious Liability, Generally

Vicarious liability—defined as "indirect legal responsibility"[1]—is based on the concept of *agency*. An *agency relationship* is one in which a person (the agent) agrees to perform services for, or act on behalf of, another (the principal), subject to some degree of control by the principal.[2] Not all agency relationships provide the basis for holding a principal vicariously liable for harm caused by the agent. The determining factor is the degree of control the principal has over the way the agent performs his or her duties. There are two primary kinds of agency relationships. The agency relationship that does give rise to vicarious liability is the master-servant relationship.[3] The agency relationship with which master-servant is most often contrasted—and for which vicarious liability (generally) may not be imposed—involves *independent contractors*.[4]

A *servant* is one who is "employed"[5] to perform services in the business of another and who is subject to the control of that person in how the services are performed.[6] An *independent contractor*, on the other hand, is a person who "exercises independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work."[7]

The element of *control* is key to the determination of whether an agent is a servant or an independent contractor. Several control elements are more commonly present in the master-servant relationship than in the independent contractor scenario. (These elements will be discussed below.) The right to control an agent, however, is not itself sufficient to make the agent a servant: there must also be an agreement between the master and the servant for the receipt of services.[8]

To summarize, a board may be held liable for harm caused by its servants, as defined above, acting in the course of their duties. A servant is a person over whom the board has the right of control and with whom the board has an agreement for services. The board generally will not be held liable for harm caused by independent contractors it hires.

Vicarious Liability for Volunteers, Generally

Can a volunteer qualify as a servant of a board for purposes of holding that board liable for the volunteer's negligence? This question has not been resolved in North Carolina (nor has the issue of the effect of volunteer status on the master-servant relationship more generally).[9] At first glance, it might seem that school volunteers—at least as they are currently handled by boards—cannot be characterized as servants of the board.[10] The two key elements of the traditional master-servant relationship—consent to services and the element of control—exist only tacitly, if at all, in most current volunteer-board relations.

There are, however, several reasons to believe that, as a general matter, volunteers *can* qualify as servants of their school boards. First, the authoritative statement on the law of agency, *Restatement (Second) of Agency*, explicitly provides that an agency relationship may exist without any contractual basis[11] and that a person who volunteers services without an agreement for or expectation of compensation may be a servant of the person accepting such services.[12] Other commentators on the issue have accepted this position without argument, and it seems well settled—at least among academics—that there is no reason that unpaid status, in and of itself, would prevent a volunteer from being a servant for purposes of vicarious liability.[13]

Second, lawmakers also appear to agree with this conclusion. There are indications from both the federal and the state legislatures that volunteers may be, or are, servants of their organizations. The Volunteer Protection Act,[14] a federal law passed in 1997 to limit the potential liability of volunteers, allows states to condition volunteer immunity on a requirement in state law that makes an organization liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.[15] In other words, the federal government has told states that they may hold organizations vicariously liable for harm caused by their volunteers.

The North Carolina General Assembly has also indicated—although much less concretely than the United States Congress—that it considers volunteers, particularly school volunteers, servants of their organizations. In 1997 the General Assembly considered, but did not pass, a bill to provide local school boards with limited immunity for liability stemming from negligent acts by public school volunteers.[16] The bill's sponsor certainly thought of school volunteers as board servants. There is no reason to grant such immunity to school boards unless they can be held vicariously liable for harm caused by their volunteers. Both these pieces of legislation are in accordance with the doctrine of vicarious liability.

Third, and most specifically, courts in many other states have concluded that volunteers can be servants of the persons and organizations accepting their services.[17] The issues to be addressed, these courts have held, are the same as in cases involving paid employees: Does the presumed master have the right to control the servant? Did the master and servant have an agreement for receipt of services? Did the injury complained of occur while the servant was acting within the scope of his or her duties?

In applying this analysis, at least one state court has held directly that a volunteer for a school district could qualify as a servant. The volunteer in this case was a family hosting a student from another school district during a basketball tournament. The visiting student was injured in a car accident that occurred while a member of the host family was driving. Rejecting the lower court's ruling that the volunteer could not, as a matter of law, be the school district's servant, the court pointed out that "[o]n the face of it, it seems unjust that a student could recover for injuries attributable to the negligence of a paid teacher's aide but not in the same circumstances if the aide is working without compensation. Assuming that liability would otherwise exist because of the master/servant relationship, it seems extraneous to inquire if the servant was motivated by civic virtue rather than personal gain."[18] The court went on to find that the activity in which the volunteer was engaged (transporting students) was an ordinary school activity, that the use of volunteers was reasonably foreseeable, and that the appointment of volunteers was within the implied authority of school personnel. Most importantly, the court found that even though school personnel exercised no immediate control over the volunteer, they had a "residuum of authority and commensurate responsibility" for the students. The school was responsible for looking into and responding to complaints concerning the host's driving and had the authority to terminate the volunteer's service at will.[19]

So, in what circumstances might the relationship between a volunteer and a North Carolina school board meet the requirements for a master-servant relationship and give rise to vicarious liability?

To reiterate the standard: The board will be vicariously liable for the harms caused by a volunteer if

- a master-servant relationship has been established;
- the board has the right in this relationship to control the physical conduct of the volunteer;
- the board has consented to receive the volunteer's services; and
- the volunteer is acting within the scope of his or her duties.

These four elements are discussed below.

Establishing the Master-Servant Relationship

A master-servant relationship may be established informally through a course of conduct; it does not require a specific agreement by the master to receive the servant's services and a reciprocal agreement by the servant to render those services subject to the master's control or right of control. This informal method is exactly the way most volunteer-board relationships are established. And although a given volunteer probably has little, if any, direct contact with the school board, the conclusion that the volunteer performs his or her services subject to the control and consent of the board is compelling.

The general rule is that a master cannot be held vicariously liable for injury caused by a third party unless that third party was acting for the master, with the master's authority, or with the consent of someone the master authorized to employ the third party.[20] In plain English, a board will not be held liable for injury caused by a volunteer unless it consented to the volunteer's assistance or authorized one of its employees to consent to the services. Authorization does not have to be explicit: "[w]here there has been continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself."[21] It seems clear that just such an authorization has occurred in most school districts in the state. The reasoning behind this conclusion is as follows.

The use of volunteers in North Carolina public schools (and in public schools across the nation) is extensive, continuous, and customary. Every school board is aware of the ubiquitous presence of volunteers in its schools. The board, as the entity with general responsibility for the operation of the schools, including control over school personnel, has the right to decide whether the use of volunteers in its schools is permissible and, if so, under what conditions. By tolerating the normally casual way that volunteers are brought into its schools, the board—given its knowledge of the situation and its authority to regulate it—consents to it and approves of the way in which it occurs. Thus the procuring and control of volunteers has, through custom and a well-established course of conduct, been delegated to personnel at the individual school level and is within their inherent authority. Unless a board takes affirmative action to exercise control over volunteer use directly, or acts to prohibit it all together, action at the level of the individual school is legally attributable to the board.

Board's Right to Control the Volunteer

In general, vicarious liability may attach only when the master has the right to control the actions of the servant. The key point is the *right* to control. The failure of a school board to exercise *actual* control over school volunteers will not prevent it from meeting the legal definition of "master."[22] Of course, as discussed above, school employees do in fact control school volunteers, and that control is attributable to the school board. But in addition, under the legal test of whether the master has the right to control servants, it is axiomatic that where the *right* to control exists, it is irrelevant whether the master actually *exercises* it.[23]

A Wisconsin case illustrates this point. A county was held liable as master for the negligence of volunteer drivers it had recruited to transport citizens who were elderly or disabled. The county did not exercise control over the volunteers: it did not supervise the drivers, the users of the transportation service contacted the drivers directly, the drivers determined their own schedules and could terminate their participation at will, and the county never met with the drivers after an initial orientation meeting. Nonetheless, the right to control was established, the court said, by the agreement signed by each driver when he or she volunteered to help.[24]

EXAMPLE 2 *A school requires all volunteers to sign in at the front office before going off to perform their tasks. The sign-in sheet contains the following statement: "My signature below indicates that I agree to abide by the policies of the school district." Below the statement is a list of selected policies singled out for special attention. The existence of this sheet with a volunteer's signature is probably sufficient to establish the right to control.*

In any particular case the evidence of the right to control may be less direct than a signed agreement by the volunteer. For example, many boards are members of the North Carolina School Boards Association insurance trust fund, which provides some coverage for harm suffered or caused by volunteers. This coverage is limited to actions performed by the volunteer "within the scope of the written authorization provided to each individual volunteer by the school district or other educational entity."[25] This provision explicitly recognizes the right of control, through "written authorization," over "each individual volunteer." Both the insurer and the member boards assume, rightly, that a volunteer renders only those services that are authorized by the board or its agent. Another indirect manifestation of the right to control might be an agreement to provide legal defense in certain cases of volunteer harm.[26]

Most importantly, a board's general authority to regulate its schools, in and of itself, is probably sufficient to establish its right to control volunteers in the schools. (The California case cited in note 18, above, involving a school board and its volunteer drivers, seems to indicate this.) But the general authority must extend beyond the mere right to control the volunteer's access to school premises and the general conduct of the volunteer while he or she is there; it must embrace the details of how the volunteer performs his or her particular task. Whether it does extend to this point depends not so much on the board's authority as on the kind of volunteer services in question. If the volunteer meets the definition of a servant, the right to control does extend so far, but if the volunteer instead meets the definition of an independent contractor, it does not.

In determining whether an agent is a servant or an independent contractor, courts will ask the following questions:

- Is there an agreement for, or actual, close supervision?
- Does the job require a low level of skill?
- Does the master supply the tools and place of work?
- Has there been employment over a considerable period of time with regular hours?
- Is the work part of the employer's regular business?
- Do the parties believe that a master-servant relationship exists?[27]

None of these factors alone is necessarily sufficient to support imposition of vicarious liability; on the other hand, not all of them need be present to support it. For example, although close supervision of a volunteer may establish the right to control, some jobs—particularly those requiring low skill levels—generally will not be closely supervised. Yet the performance of them may create a master-servant relationship.

EXAMPLE 3 *A volunteer regularly comes in at the end of the school day to copy the next day's class assignments, which teachers leave for him in a designated box. He makes as many copies of each assignment as a particular teacher specifies, and when he is done he follows the instructions given by the principal for locking up. This volunteer probably qualifies as a servant for purposes of vicarious liability. He performs, on a regular basis, a low-skill job that is an ordinary part of the school's business, he follows the instructions given to him in performing it, and he uses school tools. He is not, however, closely supervised.*

In other cases, while there may be some level of supervision from school personnel, the task may be one that is not in the regular business of the board.

EXAMPLE 4 *The members of the high school cheerleading team decide to hold a dance marathon to raise money for their favorite charities. They establish a committee that assigns duties, they get a school employee to act as a chaperone, and they rent a site. During setup the school employee asks a nearby student whether she knows who is in charge of setting up the musical equipment. The student doesn't know, and the employee suggests the student start doing it herself and gives her some duct tape for holding down wires. Another student is injured when the equipment falls, and he sues the board and the employee. Is the board vicariously liable for the negligence of the student in setting up the equipment at the suggestion of the board employee? No. Even though a school employee was present at the setup, asked a student to perform a task, and provided some equipment, the evidence that the employee controlled the student's actions is insufficient to impose* *liability on the board. The board did not decide to hold the event, and it was not in furtherance of school business. The board did not select students to perform the various tasks or have control over how, or even whether, the students performed the setup of musical equipment.*[28]

Even if a volunteer project is within the scope of business usually performed by the board or school, it may be performed by volunteers who are insufficiently under the school's control to hold the board liable for their activities.

EXAMPLE 5 *Each year the doctor father of an elementary school student voluntarily comes to the school to provide vaccinations for students. One student turns out to be allergic to the vaccine, and his parents sue the doctor and the board for the medical costs incurred in treating his allergic reaction. Is the board vicariously liable for the negligence of the doctor? No. Even though the doctor is on school premises and comes regularly, he provides his own tools and is not subject to the control of the school in the way he performs the duty. He is subject to state requirements, such as professional boards and so forth, but the nature of his duties is such that the board is unqualified to do anything more than to make a careful investigation of his qualifications to perform the services.*

EXAMPLE 6 *The Elks Club holds an annual fair at the local elementary school and gives the proceeds to the school. The fair booths are staffed by a mixture of Elks and school personnel. Much of the equipment for the fair is rented by the Elks from a local company that gives them a break on the rental cost because "it's for the school." If an Elk causes harm by his negligence, is the board vicariously liable? Even though this event is held on school premises and its proceeds go to the school, the board probably could not be held vicariously liable. The Elks Club is an organization that chooses its own members. It arranged the fair and provided its own equipment. Furthermore, it is unlikely that an objective observer at the fair would believe that the Elks were servants of the board.*

The last indicator of the right to control—the belief by both parties that a master-servant relationship exists—may be a useful one in school cases. Surely most volunteers believe that the services they are rendering the school are subject to the school's control; and surely school boards and school employees believe this also.

EXAMPLE 7 *A teacher asks a high school student to help him move the desks in the classroom into a new position. While doing so, the student accidentally rams a desk into another student's leg. That student is injured and sues the board. Is the desk-moving student a servant of the board for purposes of vicarious liability? Probably not. Although the student was* *moving the desks at the request of, and under the direction of, a school employee, neither of them probably thought that the student was a servant. The student probably thought (and rightfully so) that assisting a teacher was part of* his *regular business as a student.*

Other indicators of control over a volunteer include some fairly obvious candidates. For example, a board might exert control over the conduct of volunteers through the establishment of an official policy governing volunteers' activities. Elements such as job descriptions, training requirements, and reference checks are all clear mechanisms of control. Lists of certification have been admitted as evidence of control.[29] The existence of a particular hierarchical structure within which the volunteer renders service may also be evidence of the right to control, as may be a simple list containing volunteers' names, skills, and hours of availability. More persuasive yet would be the listing of the volunteer's name on a schedule or timetable showing when volunteers arrive at school to perform their services.

Board's Consent to Receive Volunteer Services

In general, vicarious liability may attach only when the master has consented to receive the services of the servant. That consent need not be in the form of a written agreement. Volunteers are such a common sight in the public schools that the fact that a board has taken no action to remove them from its schools would seem to indicate that it has acquiesced to their presence and that the authority to give consent to services has devolved to employees at individual schools. In most cases, whether or not consent has been given will be easy to determine. For example, soliciting volunteers for a certain project clearly indicates consent.

Consent, like the right to control, may be explicit or implicit. Implied consent can be manifested in a number of ways. For example, a board might procure a liability policy that provides for coverage of volunteers. Or a board might establish an agreement that, in certain circumstances, it will handle the legal defense of a volunteer who is being sued for harm that arises from his or her volunteer services.[30] Individual schools and school employees are equally as capable of giving implicit consent to volunteer presence as are their boards.

EXAMPLE 8 *Without seeking permission, a neighborhood resident plants flowers in a small plot around the flag pole in the front yard of the school. The school principal occasionally sees the neighbor weeding the plot and watering the flowers. One day a young student eats some of the dirt from the flower bed and becomes violently ill—from what turns out to be toxic fertilizer. The student's parents sue the volunteer and the board. Did the board, via the principal, consent to the neighbor's services? Probably so.*

Because the principal is responsible for the day-to-day operations at her school and because she has the authority to remove trespassers from school premises, the fact that she knew of the neighbor's presence and did not ask her to leave indicates consent.

Another indirect, but fairly obvious, method of consenting to volunteer services might be keeping a sign-in sheet at the front desk of the school.

Of course, most often schools will directly solicit volunteer assistance.

EXAMPLE 9 *At the beginning of each year, the school sends each student home with a "driver registration" form for his or her parents. If a parent would like to volunteer to transport students to and from designated school functions, the parent must fill out the form, giving information about his or her driver's license, traffic infraction history, and liability insurance. Thereafter a list of "approved drivers" is prepared from which parents can be called to drive for school-sponsored functions. In a suit concerning injuries arising from an accident that occurred while an approved parent driver was at the wheel, a court will probably deem the board to have consented to this service (even though the consent was not given by the board and was not given in the specific instance). The solicitation and the existence of a formalized routine seal the deal, so to speak.*

EXAMPLE 10 *If, on the other hand, a parent arrives to drive his or her child to an away game and spontaneously agrees to drive several of the student's teammates as well, the board will probably not be found to have given consent for this service.*

Acting within the Scope of Employment

If the relationship between a school board and a volunteer meets the standards of a master-servant relationship, then the board may be vicariously liable for harm caused by that volunteer if one more criterion is met: when the volunteer caused the harm, he or she must have been acting within the scope of the volunteer's duty. Conduct does not fall within the scope of duty merely because it occurred while a volunteer was "on duty."[31] The harm must arise from conduct that the board either authorized beforehand or ratified after the fact. For this reason, if harm results from an intentional wrongful act by a volunteer (such as assault and battery or slander), it will generally fall outside the scope of his or her duty.

Determining whether a board or school explicitly authorized an act by a volunteer presents no great difficulty. Nor should determining whether the board approved the volunteer's actions after the fact. However, given the general lack of control exercised over most volunteer activities, authorization of a volunteer's conduct will often be implicit at best. *Implicit au-*

thorization exists when the conduct that caused harm was (1) within the range of duties the servant was engaged to perform and (2) in furtherance of the master's business.[32] Whether conduct falls within the range of the servant's duties will depend on factors such as the job description; the limits of time and space in which the servant is supposed to perform the job; and the instruments or methods that are expected to be, or customarily are, used in performing it.[33]

The analysis required to answer the scope of duty question is the same for all servants—whether paid or unpaid, ongoing or one-time. But performing this analysis in the context of a volunteer program may be difficult. For example, the fact that many, if not most, volunteers do not have formal job descriptions complicates the task of assessing the range of a volunteer's duties: a volunteer may not be limited to the performance of one type of job (he or she may have multiple roles within the school); the volunteer may have no specified role at all; or the volunteer may have had a specified role that has, through a course of conduct, been expanded beyond its original definition.

EXAMPLE 11 *A parent volunteers as a hall monitor at his local elementary school. The principal tells him that his duty is to "keep an eye out" and to call for help from the nearest school employee if there is trouble of any kind. During his third week on the job the volunteer notices that a young boy on crutches is having trouble getting down the stairs. The volunteer begins the practice of carrying the boy down the stairs. On various occasions different school personnel see the volunteer doing this and comment during coffee breaks how sweet the practice is. One day the volunteer slips while carrying the boy in a very careless manner, drops the boy, and the boy is injured. The boy's parents sue the board. Is the board vicariously liable for the volunteer's negligence? Probably. The board contends that while the volunteer may have been its servant, he was acting outside of the scope of his duty—and in violation of specific directions—in carrying the boy down the stairs. However, the fact that the volunteer had been engaging in this conduct over a period of time and with the knowledge of school personnel effectively rebuts that argument.*

Determining whether the volunteer's conduct occurred within the limits of time and space in which he or she was supposed to perform a task may be difficult, because volunteer service is often structured as a one-time/one-task affair or has no particular established hours. In addition, much volunteer work is performed off school premises under no direct supervision, making problems of proof much more difficult.

Finally, determining whether a volunteer's conduct was within the scope of his or her duty by examining standards particular to the field in which the volunteer acted may be difficult because of all the factors cited above.

Even if the volunteer's harmful conduct is found to be within the range of duties he or she was asked to do, it must still be found to be in furtherance of the master's business before it will satisfy the legal test for scope of duty. The volunteer's intent in engaging in the conduct in question is relevant, and if the intent was to further school business, it does not matter whether he or she also had other motives for engaging in the behavior. In certain cases, it may not even matter that the master has specifically prohibited the conduct.[34] Thus although intentional harmful conduct generally falls outside the scope of a servant's employment, if it is used to further a business interest of the master (and does so, even though in some perverse way), it may fall within the scope.

EXAMPLE 12 *An elementary school principal is accused of sexually assaulting a student. If the student's parents bring suit against the school board, seeking to hold it vicariously liable for its employee's acts, a court will probably find that the assault was motivated by a purely personal objective and served no purpose of the board's. Thus it did not occur within the scope of the principal's duties.*[35]

EXAMPLE 13 *A volunteer hall monitor is sued for battery—an intentional tort—by a student whose arm he sprained when pulling him out of a fight on school premises. The student also sues the school board. Because the volunteer presumably pulled the student out of the fight to keep order in the hall, the conduct probably occurred within the range of his duties and in furtherance of the board's business. The board could be vicariously liable for the harm.*

Summary—Master-Servant Relationship

Although the vast majority of cases imposing liability on a master for harm caused by a servant involve employers and employees, a master-servant relationship can exist between a volunteer and the person or organization who receives the services. The exchange of wages for service is not a requisite element of the relationship—at most it is a proxy for the crucial element of the right to control. So long as a board, directly or through its agents, has the right to control the way volunteers perform their school services and has consented to the receipt of those services (again, either directly or through its agents), a master-servant relationship may exist. A board may thus be held liable for harm caused by volunteers so long as it occurred during the scope of their "employment" with the schools.

Defenses to Vicarious Liability for Volunteer-caused Harm

The Fellow Servant Rule

Suppose a volunteer is injured by the negligence of a school employee or a fellow volunteer. Can the school board be liable to the injured volunteer through vicarious liability? If the employee or fellow volunteer was in a master-servant relationship with the board and was acting within the scope of his or her duties when the injury occurred, then at first blush the answer seems clear: yes, vicarious liability attaches to the board. But in such a case the board may have a defense based on the "fellow servant rule."

The *fellow servant rule* absolves the master of liability to a servant who is injured by the negligence, carelessness, or misconduct of fellow servants.[36] This rule, originating long ago in the common law, is based on the notion that once an employee accepts employment, risks that are not the duty of the employer to address—such as a fellow employee's negligence—are strictly the concern of the employee. It was thought that the employee himself or herself had as much of a chance—if not a better one—to be aware of the risks posed by fellow employees as did the employer.[37]

Because of modern workers' compensation laws, including North Carolina's, the fellow servant rule rarely comes into play anymore. Workers' compensation laws essentially eliminated consideration of anyone's negligence in cases of employee injuries. Employees receive compensation for their injuries so long as the injuries arise out of and during the course of their employment, even if no one was negligent or if a fellow employee was negligent. There are no defenses available to the employer, and this is the exclusive avenue of compensation available to the injured employee against the employer. Thus an employee who is injured by a colleague's negligence will be compensated for his or her injury under (and only under) the workers' compensation system.

EXAMPLE 14 *A volunteer who has been serving as a classroom tutor once a week for the last year, under the supervision of a teacher, injures the teacher by negligently handling a Bunsen burner. The teacher will be compensated under the Workers' Compensation Act (which is her exclusive remedy), because working with volunteers is a normal part of her job and the injury she suffered arose out of and during the course of her job.*[38]

Because most servants are employees and are entitled to workers' compensation benefits, the fellow servant rule applies only in the small number of cases where the injured servant is not an employee entitled to workers' compensation benefits. Volunteers who qualify as servants of the school board are just such servants. Although their unpaid status does not prevent them from meeting the definition of servant, it does prevent them from meeting the definition of employee covered by the Workers' Compensation Act. The whole workers' compensation system is based on the notion of wages. Responsibility for payment of workers' compensation benefits is allocated between the state, the local government, and the employer, based on the source of the employee's wages. The level of compensation corresponds to the employee's rate of compensation.[39]

EXAMPLE 15 *As in Example 14, a volunteer has been serving as a classroom tutor once a week, but in this case the teacher's negligent handling of the Bunsen burner harms the volunteer. The volunteer is not eligible for workers' compensation benefits—because she is not an employee—but seeks to hold the board vicariously liable for the teacher's negligence. The volunteer will not recover against the board if the board raises the defense of the fellow servant rule.*

The same defense would apply if the volunteer was harmed by the conduct of another school volunteer who also qualified as a servant of the board. (And note that if the harm occurred while the volunteer was acting within the scope of his or her duties and was not the result of conduct constituting gross negligence—or worse—the injured volunteer would not be able to recover from the negligent volunteer under the Volunteer Protection Act).[40]

The fellow servant rule is very old, and the justifications for it are not very persuasive in the modern workplace. Most jurisdictions have abolished it or severely limited its use; North Carolina has not yet done so. A case in which a dedicated volunteer is injured by the negligence of a school employee may provide just the impetus to abolish or restrict this rule.

The Volunteer Protection Act

As mentioned at the beginning of Chapter 2, the Volunteer Protection Act (VPA)[41] does not directly affect the liability of a school board for harm caused by its volunteers. The language of the VPA indicates that it was not the intent of Congress to share the VPA's liability limitations for volunteers with the organizations and entities who use their services. In the section delineating the VPA's limitations on volunteer liability, the text states that nothing in that section's language "shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person."[42] Further, the VPA allows states to impose conditions on nonprofits and governmental entities using volunteers that express the belief of Congress that it is appropriate for these organizations to bear the burden of risk-reduction mechanisms necessary to prevent volunteer-caused harm and, when harm does occur, to bear the cost of recompense. For example, states may enact laws that make the VPA's liability protection of volunteers applicable only if these organizations provide a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on the organization's behalf.[43]

From these textual provisions it seems clear, at the very least, that Congress did not intend for the VPA to *create new* or *expand already-existing* liability protections for these organizations. Yet, in combination with North Carolina's derivative liability rule, that would seem to be the VPA's effect. North Carolina case law provides that when a master's liability is solely derivative under a theory of vicarious liability—that is, when the master is in no way at fault himself or herself—the liability of the master cannot exceed that of the servant.[44] Because the VPA now greatly reduces the instances in which a volunteer (servant) can be held liable for harm caused by his or her negligence, the question arises whether the school board (master) is thus relieved of liability, too.

As the language discussed above indicates, such a result probably was not contemplated by Congress when it passed the VPA, and because relieving a master of liability because its servant is protected by the VPA does not conform with congressional intent, a court encountering a defense based on the derivative liability rule will likely find that it does not apply in this context. This conclusion makes some sense not only because it is in harmony with congressional intent, but also because cases in which a volunteer is not held liable for a tort *solely* due to the VPA's protection are different in kind from cases where a judge or jury finds that a servant cannot be held liable because he or she behaved reasonably under the circumstances—in other words, that the servant did not engage in some kind of misconduct.

In cases arising under the VPA this kind of blameworthiness (for lack of a better word) determination does not occur because a volunteer cannot be held liable for negligent conduct, conduct that is not reasonable under the circumstances. Thus to say that a volunteer-servant is not liable under the VPA is not to say that he or she did not commit a wrong. For this reason it seems entirely possible that a volunteer-servant's misconduct could be a preliminary issue at the trial of the volunteer's organization and that if the trier of fact determines that the volunteer did commit an act or omission for which he or she would be held liable *but for* the VPA's protection, the organization could be held liable.

This issue has not yet arisen, since there has yet to be any reported litigation invoking the VPA. Despite this publication's pessimism about the likely success of a defense based on the derivative liability rule, it is certainly an argument worth trying.

Chapter Summary

A school board is vicariously liable for harm caused by its servants acting in the scope of their employment—even when the board itself bears no fault. Because school volunteers can meet the legal definition of servant, boards may be held liable for the harm they cause. But one definite exception to this general rule exists: When a volunteer who qualifies as a servant is injured by a fellow servant—whether a board employee or another volunteer who meets the definition of servant—the fellow servant rule will probably prevent the board from being held liable in North Carolina. The VPA may present another way to avoid vicarious liability.

The fact that a board may be held liable for harm caused by its volunteers even when the board itself is not at fault—even if the board has done all it possibly could to avoid the harm—might seem a disincentive to developing a system for screening, training, and supervising volunteers. After all, such a system can be costly in terms of human and economic resources. The risk-reduction benefits of such a system, however, in terms of assuring that volunteers who gain access to the schools are qualified for their jobs, know how to perform them, and operate under other qualified agents of the school system may be significant. This topic will be the focus of Chapter 4.

Notes

1. Black's Law Dictionary 1404 (5th ed. 1979).

2. Restatement (Second) of Agency § 1(1) (1958) (hereinafter Agency 2d).

3. Agency 2d § 219.

4. A principal may in limited circumstances be held vicariously liable for harm caused by an independent contractor—as in cases where the principal has delegated a nondelegable duty to the independent contractor or where the task the independent contractor has been hired to perform is inherently dangerous. W. Page Keeton et al., Prosser and Keeton on the Law of Torts 511–15 (5th ed. 1984).

5. As in Chapter 2, the term *employed* is used in a broad sense to mean "made use of" rather than "exchanged wages for labor."

6. Agency 2d § 225.

7. Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988).

8. Some commentators have identified a third requirement: the master must expect to receive some benefit from the services for the agent to be considered a servant. *See* Agency 2d § 2; Jeffrey D. Kahn, *Organizations' Liability for Torts of Volunteers*, 133 U. Pa. L. Rev. 1439 (July 1985). The ease with which this requirement is satisfied (if the servant is performing services in the master's business, this fact alone is generally sufficient) and the dearth of any serious discussion of it in case law involving the master-servant relationship make it unworthy of separate consideration.

9. The classification of volunteer firefighters as employees (servants) for the purpose of workers' compensation, Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995), is not relevant here. The fact that North Carolina's Workers' Compensation Act specifically provides a method for calculating the average weekly wages for volunteer firefighters in the event of on-the-job injury [Chapter 97, Section 2(2-5), of the North Carolina General Statutes (hereinafter G.S.)] removes them (and other specified unpaid workers) from the general universe of unpaid servants.

10. This conclusion would not necessarily be inconsistent with the conclusion drawn in Chapter 2 that the board can be held directly liable for the negligent employment of a volunteer. An employer has a duty of reasonable care in the selection of all employees, whether they be servants or independent contractors. This is true even though the employer will not, generally, be held vicariously liable for the negligent action of independent contractors.

11. Agency 2d § 220 cmt. b.

12. Agency 2d § 225.

13. Allan Manley, Annotation, *Liability of Charitable Organizations under Respondeat Superior Doctrine for Tort of Unpaid Volunteer*, 82 A.L.R.3d 1213 (1978); Kahn, *Organizations' Liability*, 1438–43. *Compare* Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—the Alternative to 'Nerf®' Tiddlywinks*, 53 Ohio St. L.J. 700–701 (1992). (Author states that "some cases have precluded the vicarious liability of sponsoring organizations for the tortious conduct of volunteers." However, cases cited in support of proposition did not preclude the possibility, but merely found that the relationship between volunteer and organization did not meet criteria of master-servant relationship.)

14. 42 U.S.C. §§ 14501–5 (1997). The Volunteer Protection Act is discussed thoroughly in Chapter 1. *See also* Ingrid M. Johansen, "Legal Issues in School Volunteer Programs Part II: Direct School Board Liability," *School Law Bulletin* 28 (Summer 1997): 5–7.

15. 42 U.S.C. § 14503(d)(2).

16. Senate Bill 695, 1997 General Assembly Reg. Sess. (N.C. 1997). The bill would also have provided limited immunity to volunteers and school personnel. Shortly after its introduction, the bill was referred to the judiciary committee, from which it did not emerge before the end of the 1997 legislative session.

17. Baxter v. Morningside, Inc., 521 P.2d 946 (Wash. Ct. App. 1974); Burns v. Sams, 458 So. 2d 359 (Fla. Dist. Ct. App. 1984); Jones v. Herr, 594 P.2d 410 (Or. Ct. App. 1979); Manor v. Hanson, 356 N.W.2d 925 (Wis. Ct. App. 1984); Trinity Lutheran Church v. Miller, 451 N.E.2d 1099 (Ind. Ct. App. 1983).

18. Swearinger v. Fall River Joint Unified Sch. Dist., 212 Cal. Rptr. 400, 410 (Ct. App.), *dismissed*, 709 P.2d 430 (Cal. 1985).

19. *Id.* at 413.

20. Haluptzok v. Great N. Ry. Co., 57 N.W. 144 (Minn. 1893). For a more modern version, see Lucas v. Li'l Gen'l Store, 289 N.C. 212, 221 S.E.2d 257 (1976).

21. Annotation, *Employer's Liability for Negligence of an Assistant Procured or Permitted by His Employee without Authority*, 25 A.L.R.2d 984 (1952).

22. A school board could, of course, give up the *right* to control the actions of volunteers and thus dissolve the master-servant relationship. There are two potential ways to achieve this break: (1) prohibit the use of volunteers on school premises or (2) set up, or accept volunteers only through, a separate organization that satisfies the legal test of an independent contractor. This last possibility will be addressed in Chapter 4.

23. Trinity Lutheran Church v. Miller, 451 N.E.2d 1099, 1102 (Ind. Ct. App. 1983). *See also* Kahn, *Organizations' Liability*, 1440 [citing Marvel v. United States, 719 F.2d 1507, 1514 (10th Cir. 1983)]; Coleman v. Board of Educ., 383 A.2d 1275, 1279 (Pa. 1978).

24. The contents of the agreement were not detailed in the reported opinion. Manor v. Hanson, 356 N.W.2d 925 (Wis. Ct. App. 1984).

25. North Carolina School Boards Insurance Trust Policy, 1996–97.

26. Garcia v. Herald Tribune Fresh Air Fund, Inc., 380 N.Y.S.2d 675, 679 (App. Div. 1976).

27. Other elements are also frequently cited, but they are geared specifically toward the employment context: method of payment—whether by the job or by time—and employment by one employer. Because volunteer work is by definition (at least for our purposes) work done without desire for or expectation of financial remuneration and is generally performed above and beyond the volunteer's normal employment, these elements will not be considered. The elements listed, in any event, are merely indicators of the right to control and are not requirements for the right of control.

28. Schroeder v. Board of Supervisors of La. State Univ., 653 So. 2d 612 (La. Ct. App. 1995).

29. Vind v. Asamblea Apostolica de la Fe en Christo Jesus, 307 P.2d 85 (Cal. Ct. App. 1957).

30. *Garcia*, 380 N.Y.S.2d 676.

31. Wegner v. Delicatessen, 270 N.C. 62, 153 S.E.2d 804 (1967).

32. Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 436, 378 S.E.2d 232, 235 (1989) (citing Troxler v. Charter Mandala Ctr., 89 N.C. App. 268, 365 S.E.2d 665 (1988)).

33. KEETON ET AL., *supra* note 4, at 502.

34. *Id. Compare* Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916) (custodian of private swimming pool instructed not to admit unauthorized swimmers, but did so. Held that the orders were conclusive and that conduct was outside of scope of duty).

35. Medlin v. Bass, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990).

36. So long as the master was not negligent in a duty owed to the injured servant. Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

37. KEETON ET AL., *supra* note 4, at 570–71.

38. G.S. 97-2(6).

39. In addition, the Act specifically covers volunteer firefighters [G.S. 97-2(6)] but no other volunteers, leading to the conclusion that all other volunteers are not covered.

40. *See* Chapter 1, p. 6.
41. 42 U.S.C.A. § 14501.
42. *Id.* § 14503(c).
43. *Id.* § 14503(d)(4).
44. Pinnix v. Griffin, 221 N.C. 348, 351, 20 S.E.2d 366, 369 (1942).

4 Policies for Minimizing Risk in School Volunteer Programs

THE OVERWHELMING MAJORITY of North Carolina school boards have not developed and implemented official volunteer policies. As was discussed in the introduction to this book, a policy is *official* if it is developed by a body within the local school system that has the authority to implement and enforce it (most probably the school board itself); if it is written and communicated to relevant parties; and if it is, or is intended to be, consistently applied at each school within the system's jurisdiction. A *volunteer policy* is one that provides mechanisms for screening volunteers, guidelines for training and supervising them, and possibly rules concerning how to handle harms that occur in the volunteer program. This last element is sometimes called *secondary prevention.*[1]

These elements of a volunteer policy—screening, training and supervision, and rules for secondary prevention—are directed toward different goals. Screening helps prevent dangerous or unqualified individuals from gaining access to school facilities and people, and, by increasing the likelihood of a good match between the volunteer and the position, decreases the risk of injury the volunteer poses while on school premises. Training and supervision erect barriers against the occurrence of negligent or intentional harms once volunteers are on school premises. A program of secondary prevention creates rules for handling harm when it does occur, reducing the likelihood that harm will be compounded or repeated.

There is little statutory or case law dealing directly with volunteers, and even less dealing directly with school volunteers. Chapter 2 explained that the general legal duty of school officials is to exercise reasonable care (that level of care a reasonable person in similar circumstances would exercise) in selecting, training, and supervising volunteers. In other words, school systems will be held to a negligence standard. What this general legal duty requires in terms of actual volunteer policy cannot be stated with specificity; the most that can be said is that in a lawsuit a policy will be judged by the totality of circumstances.

This chapter gives some examples of how a volunteer policy might reasonably be applied in different circumstances. It begins by examining matters a board should consider before adopting an official volunteer policy, then discusses suggested elements of official volunteer policies, focusing on the screening component and concluding with a discussion of what makes a policy "reasonable." The chapter then looks at the issue of "volunteer rights"—both legal and practical—and concludes with a discussion of the potential benefits of an official volunteer policy.

Preliminary Considerations

Should a board of education develop an official volunteer policy at all? Yes, for the practical and legal reasons we have discussed in previous chapters. It is inescapably true, however, that opposition is likely and the rewards, in the near term, will be intangible.

Opposition to the Development of a Volunteer Policy

Boards that in the past have given their schools broad discretion in using volunteers may be reluctant to develop and implement an official volunteer policy. Reluctance (and outright opposition) is likely to focus on three arguments:

- North Carolina schools do not have a problem with volunteers causing harm (or suffering harm) during their school service ("if it ain't broke, don't fix it").
- Development and implementation of a volunteer policy is too costly, both in terms of human and monetary resources.
- Volunteers will be deterred from providing service to schools if they are required to submit to screening, training, and other requirements.

There is some truth to each of these arguments, but they are ultimately unpersuasive.

The first argument contains truth in that most people who volunteer in the schools are qualified individuals with good motives who cause no harm during their school service. But this truth fails to refute two important points. First, the fact that there are not widespread reports of school volunteers causing harm does not mean that there are no harmful incidents. Harm caused by school volunteers to students is, like other forms of harm to children, quite likely to go unreported. Children often do not report maltreatment at the hands of adults (and sometimes do not even recognize it as such). Parents may try to keep maltreatment quiet to spare their children further upset. And school personnel who do learn of such maltreatment may not make it public because of parents' wishes, a desire not to stir up trouble in the community, or fear of looking bad. Harms have occurred, however. Public school personnel, who often wish to remain anonymous when relating such stories, have told of volunteers who sleep with students while chaperoning overnight functions, prospective volunteers who have been asked to leave other volunteer positions for inappropriate sexual behavior with children, and other similarly chilling tales.

Further, even were we to accept, for the sake of argument, that no harm has been caused or suffered by school volunteers in North Carolina, past performance is no guarantee of future safety. The experience of other organizations that use volunteers to work with youths gives generous cause for concern. The Boy Scouts of America, Big Brothers/Big Sisters, church groups, and other school districts[2] have all been sued for harms caused by (or for harms to) volunteers.[3] These organizations, in response, have developed policies for screening, training, and supervising volunteers. Public schools are among the few remaining institutions that do not routinely use such policies. Given this state of affairs, it seems highly likely that a prospective volunteer with bad motives would apply for a position at a public school.

The second argument, that development and implementation of a volunteer policy take time and money, also holds some truth. It takes as much time and money as is necessary to make the program reasonably safe. Ultimately if a board cannot afford to make that expenditure, it probably cannot afford to have a volunteer program. Harm caused by an inadequately screened, trained, or supervised volunteer can drive a school's liability insurance rates up and—just as important—can cost school personnel the goodwill and support of their community. To focus solely on the certain costs of developing and implementing a volunteer policy to the exclusion of the potential costs of not doing so is shortsighted.

The third argument also holds some truth. Putting into place a program for screening and training school volunteers likely will deter some people from volunteering their service. This deterrence is not all bad, insofar as it may reach people who should be deterred—for whatever reason.

EXAMPLE 1 *A school publishes the following position description in its newsletter: "Needed: Volunteer to transport third graders to and from sports camp on Wednesday afternoons. Volunteer must have own car, insurance, and good driving record. School will check driving records of all applicants." This published position description will allow volunteers with poor driving records to screen themselves out.*

EXAMPLE 2 *A new member of the community is seeking volunteer work that involves children. The following ad piques his interest, until he reaches the last sentence: "Volunteers needed to establish one-on-one, longstanding, supportive relationships with at-risk children. Significant time and emotional commitment required. Interested applicants must consent to criminal history background checks." Before moving to this community, the prospective volunteer had been serving time in prison for child abuse.*

Of course, good volunteers may also be deterred by screening and training requirements. If schools take pains to explain the rationale behind their policies, however, most volunteers will understand that a given policy is not a sign of suspicion about them but a prophylactic measure designed, primarily, to protect the children they are interested in serving. Child abusers or other individuals who may be inappropriate school volunteers do not wear signs. It is necessary to have a policy and to apply it consistently and evenhandedly. This being said, most volunteers will not serve in positions so risk-laden that they require the kinds of screening mechanisms or the degree of training that might deter them from serving.

Liaison Organizations

In the end, it may be that a cost-benefit analysis leads a board to conclude that the development and implementation of a volunteer policy is too costly. Should the board then simply accept the risk posed by unregulated volunteer programs? If this risk cannot reasonably be ignored (which is the thesis of this publication), then the use of volunteers—in all but the most innocuous and heavily supervised activities—must stop. In short, the board has three choices: implement a volunteer policy; put a halt to the use of volunteers; or make use of volunteers from other organizations that screen, train, and supervise volunteers.

Rather than implementing its own volunteer policy, a board may be wise to use the services of volunteers who come from a separate organization that screens, trains, and supervises them, especially in the case of volunteer positions that require in-depth screening. Put another way, the board may want to structure its relationship with volunteers in such a way as to avoid creating the existence or appearance of a master-servant relationship. The board would still, of course, have the responsibility of determining whether the liaison organization uses reasonable mechanisms to weed out unsafe or incompetent volunteers[4] and would want to make sure that its relationship with the liaison organization (associational rather than supervisory) is made clear to parents, students, and volunteers. Additionally, for outside volunteers who perform most of their services in the school or around school personnel, the liaison organization should maintain clear-cut responsibility for selecting the volunteers, possibly for assigning them, and for keeping tabs on them. All of these measures should be undertaken so that the board does not effectively become the master of the volunteer.[5]

EXAMPLE 3 *The Smiley County Elementary School determines that it does not have the time or resources to reasonably screen, train, and keep up with after-school mentors for at-risk kids and receives permission from the board to seek mentors through a liaison organization. The principal of Smiley Elementary makes contact with the nearby office of Big Brothers/Big Sisters and determines that the organization has a fully developed regimen for screening, training, and supervising its volunteers and would be able to provide mentors for many of the school's children. Smiley's guidance counselor then sends out letters to the parents of affected students, stating that their child has been recommended for participation in a mentor program to be provided by the Big Brother/Big Sister Program (an independent service organization). The letter explains that the school has no role in screening,* *training, or supervising the mentors. It merely establishes the link between the child and the mentor and, on occasion, will provide relevant information about the student to the mentor and may also provide space on school premises for mentor-student activities.*

This activity should satisfy the board's legal duty to make reasonably sure that it is not hooking its students up with unsafe or unfit individuals, while avoiding legal responsibility for screening, training, and supervising such individuals.

Policy Creation

If a board decides to develop a volunteer policy, several questions arise. First, who should be involved in developing the policy? An indispensable participant would be a person or body (whether it be the board or—at the level of the individual school—the principal) who has the authority to develop rules and regulations governing volunteer use. Members of school-based committees, PTA leaders, and other parents who are involved in school activities are also desirable participants, if for no other reason than that, as volunteers, they have a very direct interest in how the policy develops and will be more likely to comply with it if they have been involved in its creation. Further, they have valuable hands-on knowledge of how the volunteering process works. Since most North Carolina school boards have no official volunteer policy, it also makes sense to take advantage of people and organizations who have developed and used one. Many nonprofit organizations—especially those serving vulnerable populations—have highly developed programs for the use of volunteers and could provide useful information. Other school districts, either in North Carolina or elsewhere, may have programs in place. A board also might consult insurance agents not only about liability insurance coverage but also about areas of potential risk in its volunteer program. Finally, the board attorney or other lawyer with knowledge of school law issues should—if not made a direct participant in the development process—at least review the resulting policy.

Second, should the school board have one policy to which all schools must adhere, should it allow deviations, or should it just require that each school have a policy and say nothing further as to content? The last option does not seem feasible, however, given that the board will ultimately be held responsible if a school's policy is found unreasonable. But if the board establishes a basic policy below which no school will be allowed to fall, there may be room to leave some implementation decisions to the school. On the whole, however, the board will probably have an easier time assuring that implementation is reasonable if standards are clear and fairly uniform.

Finally, what should the chain of authority be in implementing and enforcing the volunteer policy? Who should have ultimate power to decide whether a volunteer is an appropriate candidate for a position? Should the authority rest with one volunteer coordinator in each school, with the individual supervisor within the school, with a separate agency set up to run the school volunteer program, or with an administrator outside the school? Because a volunteer policy is only as good as its implementation, it makes sense to have a designated person in charge of monitoring compliance with the policy at each school.

Once a board has established a body to develop the policy, it can begin to focus on the discrete elements of an official volunteer policy: screening, training, supervision, and secondary prevention.

Elements of an Official Volunteer Policy

Screening

Screening alone is not a sufficient safeguard against harm in volunteer programs, but it is an important element, especially for volunteer positions without extensive school supervision. It is also the part of a volunteer policy that is most likely to draw fire from both administrators and volunteers. Because screening may reveal private and, at times, negative information about the potential volunteer, it raises serious concerns about "volunteer rights"[6]—primarily the right to fair treatment (nondiscrimination) and the right to privacy (and the related right to be free from defamation).

The following screening mechanisms are just suggestions. None of them are mandatory. Much of the discussion on screening is based on the author's experience in working with the volunteer screening workgroup of the Chapel Hill-Carrboro City Schools (CHCCS). The sample screening materials contained in the appendixes at the end of this publication are adapted from this same group.[7]

Position descriptions

Because screening is reasonable when it addresses the qualities relevant to a particular position, job descriptions are the bedrock of the screening process. Position descriptions might include some or all of the following information:

- the volunteer's duties;
- the setting in which the duties will be performed (for example, library, classroom, playground);
- the number of students with whom the volunteer will work;
- the times when the volunteer is needed (days of week and times of day);

- the training and orientation required;
- other necessary qualifications;
- the name of the person responsible for supervising the volunteer.[8]

While developing position descriptions is, strictly speaking, preliminary to the screening process, it is nonetheless an important element of the process. Identifying the characteristics of a given volunteer position helps to clarify the risks the position carries (both to the volunteer and to those served by the volunteer) and the qualities that will make a candidate for a position a safe and competent volunteer. "Risks posed" and "qualifications needed" are the two factors crucial in determining what kind of screening is reasonable for a given position.[9]

In determining the risk that a particular position poses, two things must be considered. The first is the risk that inheres in the position itself, usually due to the use of some kind of dangerous instrument—for example, a car or power tools. The second is the risk that arises from the vulnerability of the person served by the volunteer—in the school context, most often this person will be a child. When the people served are children, some of whom may be disabled, the risk of harm is greater than when the people served are adults. When the position is one in which the volunteer will spend time alone with a child, the risk of harm increases. Necessary qualifications can be both professional (for example, knowledge of algebra) and personal (for example, ability to interact with a child in a way that respects the child's maturity level, culture, and traditions).

Job descriptions serve important functions both before and after a volunteer has been placed in the school. Before placement, the description allows potential volunteers to decide whether they have the skills and qualities needed for the role, culling the pool of applicants and thus saving school personnel time spent screening. Including in the description a list of required background checks (reference checks, for example, or checks of driving records, criminal history, or credit, when relevant) furthers this culling process, eliminating people who are unwilling to go through these checks, for whatever reason.

After placement, job descriptions help everyone keep track of a volunteer's duties. A volunteer who knows what is expected is less likely to behave inappropriately than one who does not. School officials will also have a well-defined basis for evaluating a volunteer's performance, suggesting improvements or changes, and, if necessary, removing the volunteer from the position. Given that many school volunteers are parents of students in the school, being able to point to the description and tell a parent-volunteer that he or she has been failing to perform this duty or has been performing that duty without authorization may reduce the awkwardness of an inherently uncomfortable encounter. Finally, as Chapter 3 outlined, having clearly defined duties may help a board avoid vicarious liability if a volunteer injures someone while acting outside the scope of his or her duties. The board may point to the description and justifiably claim that the injury did not occur while the volunteer was performing a task in furtherance of the business of the school.[10]

Applications

Potential volunteers who believe that the qualities they possess match a certain job description should then fill out an application. Applications may be more or less detailed, depending on the position to be filled and also, possibly, on the person seeking the position. A board might consider a honed-down application form for volunteers who are parents of current students or for volunteers who are "well known" to school personnel. The wisdom of such a practice is questionable on two grounds: (1) the mere fact that a person is a parent does not make that person a known quantity or a no-risk volunteer; and (2) criteria for determining when a person is "well known" to school personnel (and to which school personnel the person is so known) may be hard to define and may make the exception susceptible to easy manipulation. If the honed-down practice is applied only to low-risk roles, or if the definition of a well-known person is clear, such a policy might be an acceptable compromise between the desire to keep dangerous or unqualified persons out of the schools and the desire to avoid the administrative burden and potential offense to community members that screening requirements pose.

Basic application elements might include the following:

- Identification: name; phone number; current address as well as addresses from some (say, five) years prior, with dates of occupancy;
- Qualifications: academic achievement; training courses with dates; certificates and licenses;
- Experience, both paid and volunteer: dates of service; description of duties; organization to which service was provided; name of immediate supervisor with address and telephone number;
- Background and references: criminal convictions or serious motor vehicle violations; three personal or professional nonfamily references with address, telephone number, and nature and length of relationship;
- Disclaimer: a conspicuously placed note informing the potential volunteer—in plain language—that although the school district does not intend to gratuitously share the volunteer's information with the public at large, the volunteer's application and most of the information compiled about him or her is a public record under North Carolina law, open for inspection, and cannot be kept confidential;
- Waiver and consent: the applicant's certification that the information is true and accurate; authorization of the school system to

verify the information and waiver of any right to confidentiality; specific list of procedures the applicant authorizes;
- Signature and date;
- Other information, such as Social Security number, driver's license number, or insurance information may be necessary if the volunteer is applying for a role that requires more extensive screening, such as criminal history record checks or driving record checks.

The application information provides the first chance to assess whether a volunteer's skills and qualities meet the requirements of a given school volunteer role. It also provides the first chance to look for "red flags""—pieces of information that do not necessarily disqualify an applicant from a position but that do raise the possibility of some problem and thus bear further investigation. Red flags may appear in the way the volunteer has filled out the application—for example, inconsistent or omitted information—or in the content of the application itself.

EXAMPLE 4 *A prospective volunteer tutor completes an application form but leaves the space for "three nonfamily references" blank. One possible explanation for this omission is that the prospective volunteer did not know three persons who had good things to say about her, an obvious reason for denying her application. Another explanation is that she wanted permission from each of her references before she gave out their phone numbers, showing consideration and mature judgment. Further investigation (probably in the form of a conversation with the applicant) would reveal whether this red flag is a serious problem. Failure to investigate this omission, if the volunteer was placed in the school and caused harm, could certainly constitute evidence of negligence.*

EXAMPLE 5 *The application for persons applying for tutoring positions has a section entitled "Addresses for the last three years, if different from current address." A prospective volunteer fills this section with eight addresses in five different states. Frequent moves such as this, without explanation, may indicate that a person is fleeing some kind of financial or criminal trouble. On the other hand, it may turn out that the applicant's spouse is working for a company that is setting up various branches throughout the nation, requiring the couple to move from location to location during the set-up stage.*

Frequent unexplained moves are one of several red flags that organizations who serve children have identified. Others include the following: drastic changes in employment with unexplained gaps (possibly indicating terminations, employers not listed out of fear, or periods of incarceration); criminal convictions or serious motor vehicle violations; overinvolvement in children's activities—to the exclusion of age-appropriate activities (possibly indicating an undesirable fixation on children); and history of drug or alcohol abuse.[12]

Interviews

Interviews are valuable tools for getting a sense of a prospective volunteer's personality, but they can also give free rein to any prejudices based on personal appearance that an interviewer might have. For this reason it is important to interview from a written script, ensuring that crucial questions get asked and that interviews for the same position are consistent.[13] Of course, not all interviews need to be full-blown investigations into a person's moral character. Some low-risk positions—for example, a one-time speaker in a science class—may require just a phone call or brief introductory meeting. Notes should be taken by the interviewer, recording impressions as well as objective information that emerged during the interview.

The first part of the interview should confirm the accuracy of the information from the application and investigate red flags. If the person is applying for a low-risk position, the interview may consist of little more than this confirmation. If the applicant is being interviewed for a position that entails more risk, of course, subsequent parts of the interview will delve deeper. Because one of the most significant risk factors a volunteer position can have is unsupervised time with children, many questions will be designed to identify any tendency on the part of the applicant to hurt children. Because questions of this nature are sensitive, a school counselor or social worker might be a good person to ask them. The CHCCS workgroup developed the following basic roster of questions:[14]

- Why do you want to volunteer in our schools?
- What type of volunteer role are you most interested in playing? (And further, with what age or type of child would you most like to work? Are there groups of children with whom you would not feel comfortable working? Do you prefer a one-on-one, small group, or classroom setting?)
- What qualifications and training make you appropriate for this role?
- Tell me a little about your interests, skills, and hobbies.
- What is your philosophy on discipline?
- Describe your temperament.
- What other information would you like to share about yourself?
- What questions or concerns do you have about being a school volunteer?

Notice that the questions are not designed to elicit "yes" or "no" responses but to allow the applicant to give as lengthy an answer as he or she pleases.

In addition to looking for indications that a prospective volunteer may not be appropriate to work with children, the interview probably should also screen for appropriateness to work on school premises more generally, looking for traits such as unacceptable personal prejudices, asking questions like these:

- What experiences have you had working with members of different racial or ethnic groups?
- Have you had any negative experiences with a particular group?
- Have you ever worked or socialized with a person with a disability?
- How do you feel about being supervised by a woman/man (as appropriate).
- What role, if any, do you think religion should play in the public schools?

References

If a prospective volunteer is still in the running after the interview, and if the characteristics of the position make it reasonable to do so, further background checks should be conducted.

The most obvious background check is the reference. Reference-givers may be personal or professional colleagues or acquaintances from previous volunteer experiences. Questions asked of reference-givers should attempt to confirm the accuracy of the information the applicant has given on his or her application and during the interview. Other questions should directly relate to qualities desired or to be avoided in the position. General clean-up questions should also be asked.

EXAMPLE 6 *A community member volunteers for the position of after-school mentor. He lists as one of his references his previous employer, the city parks and recreation department. The person checking this reference verifies the dates of employment and the volunteer's position with the department. She also asks role-related questions: Has the reference-giver ever seen the applicant interact with children? If so, in what circumstances (one-on-one, small groups, large groups)? How does the applicant interact with the children (disciplining them for misconduct, leading them on tours, teaching activities)? Her more general questions focus on the applicant's character: Does he exercise good judgment? Is he responsible, pleasant, mature? Clean-up questions include the following: Would you have the applicant work for you again? Do you know of any problems or conditions that might interfere with applicant's ability to work with children—substance abuse, mental or emotional illness, or history of child mistreatment? Is there anything else you think I should know about the applicant?*

References may be checked over the phone or by letter. With a willing reference-giver, phone calls may be more effective. They are quicker and can be more candid and thorough—follow-up questions can be asked immediately. Also the tone or rhythms of a person's voice can be revealing. Some reference-givers will not, however, respond to a reference request unless they receive written consent from the subject of the reference.

Other reference-givers, especially if they are former employers (and particularly if they have negative information), may be reluctant to give information to the school even if they know the volunteer has given consent to the reference.[15] This reluctance stems from a fear of being sued for defamation, breach of privacy, or related things. These issues will be discussed below. It may be that these reference-givers will reveal only limited information—such as confirming position title and date of employment. Though this information is not overly illuminating, it can confirm or disaffirm that the volunteer is a truthful person.

Other background checks

For the few high-risk school volunteer positions, it may be reasonable to check sources of background information such as criminal history and driving records in addition to references.[16]

Criminal history records come from different sources, with correspondingly different requirements for obtaining and handling them. The most straightforward way of investigating an applicant's criminal history is to check with the clerks of court in various counties where the person has lived, worked, and so on. Certified copies of conviction records from the clerk's office are public records and can be used with confidence in making volunteer placement decisions. Of course, this method may require a fair bit of legwork. There are private companies that will check these records for schools, for a cost of approximately $12 per request.[17] Records obtained this way (as opposed to records obtained from the State Bureau of Investigation) are based on name only, so if a prospective volunteer had been charged or tried under another name or has given school personnel a false name, these records would not show up in the search. In addition, it is possible that records for another person with the same name might also show up.

Another method for obtaining criminal history information on a prospective volunteer is to request that the State Bureau of Investigation (SBI) conduct a search of computerized criminal records systems maintained by the state government. A state statute authorizes the SBI to provide a criminal record check on persons who have volunteered to provide direct care to any organization, whether for-profit or nonprofit, that provides services to children.[18] Although most schools have not yet used this statute to check volunteer records, it seems that if a school can verify that the volunteer in question is applying for a role in which he or she will be spending time alone with a student, the statute's criteria have been met. Schools seeking such records need to have an access agreement with the SBI (basically agreeing to abide by the SBI's rules and regulations concerning the handling and confidentiality requirements of the records that the search produces). The SBI must have the volunteer's consent, complete name, race, gender, date of birth, and Social Security number to conduct the search. The cost of a search ranges between $10 (for a name search)[19] and $14 (for a fingerprint-based search).[20]

Records produced under any of these search methods cover state criminal history only, and it appears that, at this writing, there is no means for a school to gain access to national criminal history reports for prospective volunteers. There are special statutes authorizing national checks of applicants for employment[21] but none authorizing national checks of applicants for volunteer positions. And although the National Child Protection Act of 1993[22] does authorize and encourage states to grant organizations providing direct care to children access to state and national records concerning crimes against children—for both volunteers and employees—North Carolina has not yet extended this access to schools seeking volunteer history.

Another fairly new, easily accessible, and always relevant source of information about a potential volunteer is the state sex offender registry. The registry contains information about persons convicted of sex offenses and other crimes against children who have been released from state custody since January 1, 1996, and have taken up residence in North Carolina.[23] Offenders who have been determined to be sexually violent predators must register their presence in a community within ten days of arrival and verify their address every ninety days until a court orders otherwise (but no less than ten years);[24] other offenders must verify their addresses annually and only for ten years.[25] Because it is possible that a volunteer who is required to register under this law could seek to avoid detection by using a false name when applying for a position, school officials should request additional identifying information such as a driver's license, date of birth, or social security number.

School officials may submit a written request to their local law enforcement agency to ascertain whether a particular volunteer's name appears on the registry.[26] They may receive a copy of the information for the cost of copying it. This kind of request, however, will only reveal information about offenders residing within the agency's jurisdiction. To check information about offenders within the rest of the state, the entire registry of offenders is available online, free, at http://sbi.jus.state.nc.us/sor.

Driving records can be checked directly through the state Department of Motor Vehicles by using the volunteer's Social Security number, full name, race, and gender. The cost of obtaining a three-year driving history on a person is currently $5.

Summary—Screening

If, after going through the appropriate screens,[27] the prospective volunteer emerges as a match for an open position, the school can take some comfort in the belief that the volunteer is a qualified and safe person to provide school service. The school may not, however, halt its efforts to minimize risk in volunteer programs at this point. Screening is only the initial step in risk minimization and cannot be 100 percent effective at keeping dangerous or incompetent individuals out of the schools. Schools must take additional measures to reduce the risk of harm once volunteers are in the schools.

Training

The training of volunteers is probably of limited use in reducing intentional wrongdoing by volunteers, but it can be of significant benefit in reducing harms caused by negligence. And training students, staff, and parents about what is appropriate volunteer behavior may help reduce the risk of intentional wrongdoing. Training does not necessarily connote an extensive program of education on each task a volunteer might perform or on the potential danger to children from volunteers. As with screening mechanisms, the circumstances will dictate what, if any, training is required to make a volunteer program reasonable.

A pamphlet is one relatively easy and useful method of imparting necessary information to volunteers. The pamphlet might discuss school policies, such as the need to keep student records confidential; the prohibition on volunteers inflicting corporal punishment or administering medicine; a zero-tolerance policy for any kind of inappropriate touching or any kind of racial, ethnic, disability, or gender discrimination; the proper response to suspected abuse or neglect of a student; or a rule against taking children off school property without the permission of parents and school personnel.[28] Other items might include emergency safety information and sources of assistance. An alternative to the pamphlet might be periodic orientations for all volunteers or prospective volunteers.

Of course, specific volunteer positions may require more specific training. Tutors may be required to demonstrate proficiency in—or complete training for—their designated subject areas. Volunteer coaches might be required to take a course in first aid. As a general rule, the higher the risk level involved in a position, the greater the need to determine that the volunteer who fills it is competent to perform it.

In training school personnel, students, or parents, the emphasis should be on familiarizing everyone with what is and what is not appropriate behavior to expect from volunteers, the guidelines volunteers are expected to adhere to, and the school's structure for handling volunteer discipline or complaints (that is, who is responsible for enforcement).

Supervision

Supervision is another, and possibly the most directly effective, method of reducing the risk that a volunteer will cause or suffer harm once allowed access to school premises and persons thereon. If each school volunteer could provide services under the constant and direct supervision of school personnel, a volunteer policy probably would not need to include rigorous screening mechanisms or ambitious training requirements. Of course, if school personnel were involved in constant supervision of volunteers, they would have less time to perform their duties and much of the benefit of having volunteers in the schools would disappear. In any event, many of the positions filled by volunteers in schools today involve off-site activities and after-school events that are not easily susceptible to steady supervision.

A school board may want to adopt a rule that certain high-risk volunteer services can be provided only in the company of school personnel. For example, if volunteers are used in the school sick room, a wise rule might be that they are never to be alone with students who need to undress. Another rule might be that volunteers who are not parents cannot be overnight chaperones unless school personnel are also along on the trip. Each volunteer, even those who are not in high-risk roles, should have a specifically named supervisor and should be made aware of the chain of command in case his or her supervisor is unavailable—or is part of the problem the volunteer needs to discuss.

Another, less direct, method of supervision consists of having volunteers sign in and out and wear name tags for identification. Name tags could be color-coded to indicate to school personnel the level of screening to which the volunteer has been subject, thus indicating as well the kinds of activities the volunteer can appropriately engage in and the areas of the school building where the volunteer is allowed to go.

For those volunteers, like mentors, who cannot be directly supervised by school personnel, the board must develop other methods of monitoring. For instance, an established schedule of meetings or "check-ins" with school personnel should be arranged. The volunteer might be asked to keep a journal of meetings with the student, covering dates, times, and activities engaged in. School personnel should also check in with the student and the student's parents to discuss the progress of the mentor-student relationship.

Another aspect of supervision is more general: The board must make sure to supervise the implementation of the volunteer policy as a whole. This includes evaluating the effectiveness of its components, the compliance of each of the district's schools with it, and the feelings of volunteers about it.

Secondary Prevention

Secondary prevention kicks in when harm has already occurred. It is geared toward minimizing the risk that harm that has occurred will be compounded or repeated. When harm occurs in a school volunteer program, school personnel should immediately investigate the circumstances surrounding the incident and document what the investigation consisted of, as well as the steps taken to prevent a similar event from recurring. It may be a very good idea to inform the school board attorney of the harm as soon as it is discovered and, perhaps, have the attorney coordinate the investigation. If the harm was a result of volunteer negligence, school personnel should make sure that the volunteer understands the duties of the position and is able to fulfill them competently. If the volunteer is allowed to continue in the position, he or she should be subject to periodic checks to make sure that the behavior that caused the harm is not repeated.

If the harm was caused by an intentional bad act by a volunteer, the volunteer's service should be terminated. It is important to secondary prevention that the volunteer not be allowed to move on to another position in which he or she can commit the same kind of wrongful act. School personnel must be honest about the reasons for the volunteer's termination if asked by a party with a legitimate interest.

Designing the Policy

Which of the above elements to include in an official volunteer policy is a matter of discretion. It bears repeating that a board is required only to take *reasonable* steps to make its volunteer program safe. A board has a legal duty to exercise reasonable care in selecting, training, and supervising volunteers. Assessing reasonableness is a balancing test, where the risks of a given position are weighed against the availability and cost of the mechanisms that were, or could have been, used to minimize the risk. How the balance is struck will vary with the facts of a particular situation. There are two components to the reasonableness inquiry: whether the policy is reasonable *as developed* and whether it is reasonable *as applied.*

Reasonable as Developed

The key to a reasonable volunteer policy is correlation between the risk a position poses and the mechanisms used to address that risk.

EXAMPLE 7 *A volunteer classroom tutor becomes angry with a student for failing to keep on task and slaps him. The student sues the school board, claiming the board was negligent in employing the volunteer. The evidence reveals that the board required no screening of prospective volunteers. Evidence further reveals that if the volunteer had been screened, the school probably would have discovered that just before applying for this position, the volunteer had been terminated from his position as a teacher in another school district because of several violent outbursts directed at students. Other evidence reveals, however, that the board's policy requires that school* *volunteers provide their services under the direct supervision of school personnel at all times and that the supervision policy had been followed in this case. While the failure to screen led to the presence of an arguably dangerous volunteer on school premises, the supervision policy significantly reduced the likelihood that he would have the opportunity to cause harm to persons or property on school premises. A court probably would conclude that the decision to place more emphasis on supervision than on screening was a reasonable allocation of resources and reduced the likelihood of harm to a legally acceptable level.*

EXAMPLE 8 *Before allowing volunteers to serve as coaches, the school board requires each of them to complete a ten-hour course covering basic first aid, principles of sportsmanship, and board rules on using school athletic equipment and fields. A volunteer who has completed this training may serve as a coach without further screening. A student's on-field injury is made worse by her coach's negligent application of a first aid technique. The student brings a suit against the board, alleging that it negligently employed the coach. The student probably will not prevail. The board's policy was a reasonable method of ensuring that volunteer coaches were sufficiently schooled in the technical aspects of their jobs.*

EXAMPLE 9 *Same facts as in Example 8, except that the harm comes not from the negligent first aid but from a sexual assault on the student by the volunteer coach. In this case, the student probably would have a better chance of success in a negligent employment suit against the board. The board's method of training the coach was reasonable to address the issue of technical proficiency, but other, personal characteristics (such as maturity, good judgment, and the absence of certain criminal convictions) are also necessary qualifications for the job. The failure to screen prospective volunteer coaches for some or all of these qualities is therefore probably unreasonable—especially in light of the amount of unsupervised time coaches spend with students.*

EXAMPLE 10 *Pursuant to board policy, volunteers who help in shop class complete a lengthy training process in the use of power tools and never provide assistance unless the shop teacher is also in the classroom. They are not subject to any additional screening. During shop class a volunteer whips out a gun and, with the whole class at gunpoint, proceeds to rape a student. The name of this volunteer appears on an Internet list of convicted sex offenders maintained by the North Carolina State Bureau of Investigation. Whether it was reasonable for the board not to require schools to check volunteer names against this list is questionable. Given the ease and relatively small expense of such a procedure, and given the risk a known sex offender would pose on school premises, the failure to conduct at least this minimal screening procedure probably was not reasonable.*

Boards are not required to be omniscient or perfect in the development of volunteer policies. They need only take the time to assess the risks posed by volunteers and determine adequate methods for addressing them.

Reasonable as Applied

Simply developing a reasonable policy is not enough. The policy must also be reasonably applied. Keys to reasonable application are easy to remember: communication, consistent and uniform application, monitoring and enforcement, record keeping, and evaluation.

Communication must take place on several levels. The existence of the policy and its contents must be made known to each school. Within each school, personnel at all levels must be informed of their responsibilities, if any, under the policy and of the name of the person responsible for enforcing the policy at their school. Without such communication, the board cannot expect that its policy will be reasonably implemented. Of course, prospective volunteers should be informed of the policy as well.

The policy should be published—that is, written—and made accessible for reference to all relevant parties. The importance of having a written volunteer policy cannot be overemphasized. A written policy reduces the risk of confusion by being readily available for reference. Essentially, an unwritten policy cannot be reasonably applied.

Application of the policy must be consistent (that is, the policy itself must be applied in every appropriate situation), and application of the policy's requirements must be uniform.

EXAMPLE 11 *The principal of the county elementary school has a new brother-in-law who wants to be a mentor to an at-risk child. Although the county board has developed a volunteer policy that requires fairly extensive screening (and some training) for volunteers who spend significant amounts of unsupervised time with students, the principal simply reviews the files of children who need mentors and assigns one of them to his brother-in-law. The principal leaves a note in the file saying that the student has been assigned a mentor. The principal is unaware that his new brother-in-law was once convicted for assault on a minor in a neighboring county.*

Several months later the student reveals to a school counselor that his mentor, the principal's brother-in-law, has been abusing him. If the student sues the board for negligent employment of the brother-in-law, he will probably prevail. Although the board had a presumably reasonable policy, it was not reasonably applied—in fact, it was not applied at all—in this case. Had the policy been applied, the brother-in-law would probably have been prevented from assuming the volunteer position.

EXAMPLE 12 *Volunteers for the position of one-on-one tutor are required, under the volunteer policy of the school board, to have a personal interview with the school counselor and to have their references checked. At* *a local high school, the counselor regularly skips the reference check if he is satisfied with the interview. If the board is later sued for negligently employing a volunteer who was placed after going through this incomplete process, a court might well find that the existence of a reference check requirement indicates that the board knew what was reasonable in screening an applicant but failed to require it of its schools.*

Uniformity in the application of a policy's requirements is important, and so is relative uniformity in the way a volunteer's information is evaluated. The existence of position descriptions and screening, training, and supervision requirements necessarily means that some individuals are not qualified for some volunteer positions within the schools. The process of deciding who is and is not qualified, while allowing some degree of "gut feeling" and personal judgment, should focus on the match between a prospective volunteer's skills and the demands of the position, not on irrelevant personal qualities.

For this reason, it behooves a board to make the policy as uniform as possible, not only in terms of screening mechanisms employed but also in terms of criteria used in evaluating a volunteer's fitness for a role. Some of these criteria should consist of "automatic disqualifiers," such as convictions for crimes against children, sex crimes, or crimes of violence. Other criteria, of course, should relate to the qualities necessary for the specific position. The board may choose to set a "floor" for qualifications, below which a volunteer will not be placed in a given position. In choosing among candidates whose qualifications are above that floor, the board may (or may not) wish to enunciate "plus" factors—for example, past relevant experience, previous service to the school, a child in the school, new to the community, etc.

Examples 11 and 12, above, raise the important issues of accountability and monitoring. That is, the board must make sure that there is at least one person at each school—preferably someone with authority—who is responsible for enforcing the requirements of the volunteer policy. Without such an authority figure, there is simply no way to assure that each school employee who uses a volunteer conducts the proper screening and training or provides adequate supervision. Developing a policy and then implementing it in a way that cannot be monitored or evaluated is not reasonable.

Another important aspect of monitoring the volunteer policy is record keeping. While record keeping does not per se contribute to the reasonableness of a policy's application, it does document evidence of that reasonableness. Maintaining records of the screening and training a volunteer has gone through provides evidence that the school not only had a reasonably safe volunteer policy, but also that the school applied it reasonably. In addition, keeping documents on which volunteers gave consent to certain background checks or waived their right to confidentiality (discussed below) can protect the board if a volunteer claims that some aspect of the required screening, or the later handling of information gathered during the screening, violated his or her right to privacy. Documents that contain affirmations from the volunteer that the information given on his or her application is true also help to establish reasonableness.[29] Finally, a signed document attesting that the volunteer has read and understood the description of job duties may protect the board from vicarious liability if it can be used to demonstrate that the volunteer was acting beyond the scope of his or her duties.

Documenting decision-making processes can also help show reasonable application of the volunteer policy. Record keeping may be an important factor in decisions not to place a volunteer in the schools. For example, if a volunteer alleges that his or her rejection was the result of intentional discrimination, records showing that the volunteer's references were not good or that his or her skills did not match the job description can be useful. Record keeping may be even more important, however, in decisions *to* place—especially when the screen has revealed some negative information. Documentation of the decision needs to reveal that the negative information was considered and why, on balance, other positive information outweighed its effect.

The variability of the reasonableness standard may be unsettling to boards trying to develop volunteer policies that will limit their potential liability and the risk of harm in their volunteer programs. The chief benefit of the standard's flexibility, however, is that boards are able to tailor their policies to require relatively minimal risk reduction efforts for volunteers—probably for the majority of them—whose positions pose little safety hazard and reserve the more rigorous efforts for that much smaller group of volunteers who perform high-risk services for the school.

"Volunteer Rights"

Volunteer rights is a vague concept. Volunteers do not have particular legal rights or protections accorded to them just because of their status as volunteers.[30] Volunteers, although resembling school employees in many ways, are not entitled to many of the legal protections from which employees benefit. For example, the personnel records of school employees are, by North Carolina statute, confidential documents;[31] similar records kept on volunteers are public. School employees (like other employees) are statutorily protected from employment practices that, even without discriminatory intent, have a disproportionate impact on a protected minority group. Although the law on this issue with reference to volunteers is far from clear, it appears likely that practices that have a disproportionate impact on a discrete group of volunteers probably are not prohibited. Thus, in effect, boards have much more legal leeway in their treatment of volunteers than in their treatment of employees.

A volunteers does, however, have the same legal rights as the average citizen. In the context of a school volunteer policy, the most relevant of these rights are the right to be free from intentional discrimination by the government on the basis of race, gender, age, or disability, and the right to privacy. Volunteers also have the right to bring an action if they feel they have been defamed. As the discussion below will show, however, in practice these rights provide volunteers fairly little in the way of legal protection.

Screening is the element of an official volunteer policy most likely to give rise to violations of volunteer rights. It is the most invasive of the elements and the information it reveals can be misused in a number of ways.

Nondiscriminatory Policies

School boards are prohibited from using their volunteer policies to intentionally discriminate against volunteers on the basis of race, gender, disability, age, or religion.[32] There are several ways discrimination, or the appearance of discrimination, may arise in the context of screening. The screening policy may, for example, be developed with discriminatory intent.

EXAMPLE 13 *In the course of developing an official volunteer policy for the Caucasio County public schools, several board members raise concern about the growing number of Mexican immigrants in the county and the prospect that they may want to become involved in volunteer roles in the public schools. In response to this concern, the board enacts the following screening requirement: Only persons who have resided in Caucasio County or in another North Carolina county for five years can serve as volunteers in county schools.*

This requirement, given the discriminatory intent that motivated it, is legally impermissible.

Even where the policy is developed without discriminatory intent, it may be that it gets applied in a discriminatory fashion—another reason that developing uniform criteria for evaluating volunteer fitness for a particular role is important. And even a policy developed and applied without discriminatory intent may have an unintentionally discriminatory effect. That is, some of the screening mechanisms used or some of the automatic disqualifiers established may disproportionately eliminate members of a protected minority group from volunteering for school service. Though the legal precedents are not clear, it is possible that this disparate impact may constitute impermissible discrimination.[33]

EXAMPLE 14 *A school district requires that an applicant for a volunteer position have a high school diploma to be eligible to perform school service.*

As a result of this requirement, during the 1997–98 school year, none of the eighty applicants for school service who were white were eliminated from the pool, but two of the twenty-five applicants who were African American were disqualified. During the 1998–99 school year, the discrepancy between the white and black candidates disqualified was even greater, and during the 1999–2000 school year, greater still. When a committee of concerned black parents brought the issue to the attention of the school board, the board refused to change its policy. The black parents filed suit, alleging that the board discriminated against them on the basis of their race during the volunteer screening and placement processes.

As mentioned above, it is not clear under existing law whether the black parents would have a viable legal claim.[34] Nonetheless, if a screening mechanism screens out one group of potential volunteers disproportionately, the board should review why the mechanism was implemented in the first place and whether it is achieving its purpose. In the interest of not turning away community members who have good things to share with students, the board should consider whether the rule is overly restrictive or rigid. If, however, after reexamining the policy, the board determines that the mechanism does serve its purpose, the board should explain to the concerned parties just what that purpose is and how the policy serves it.

Privacy

In screening prospective volunteers for employment in the public schools, the potential for uncovering embarrassing or damaging information is clear. Screening may well ask whether an applicant has ever been investigated (or had an investigation substantiated) by social services for child abuse or neglect, has had a problem with drugs or alcohol within the relevant past, has ever been convicted of a crime, or is for some other reason an unfit or unsafe person to work with children. Negative or embarrassing information may also be compiled during evaluations of a volunteer's performance or during disciplinary or termination processes. Of course, volunteers have an interest in keeping such information confidential—or at the very least, revealing it only to those who have a "need to know."

This legitimate desire for privacy is in conflict with two important purposes of an official volunteer policy. First, if a board is serious about its policy of secondary prevention—that is, preventing harmful volunteers from perpetrating further harm—its policy should encourage sharing negative information about harmful volunteers with other organizations whose students or children may be harmed by the volunteer in question. Second, because the board wants to document evidence that it exercises reasonable care in its volunteer program, keeping records on most volunteers will be part of its policy.

Releasing negative information about a volunteer's performance raises the specter of a defamation suit. A volunteer's chance of prevailing in such a suit is very small, but merely having to defend such a suit may be a significant nuisance for a school board. Defamation is a "false communication by one person about a second person that 'tends to so harm the reputation of [the second person] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"[35] A statement can only be defamatory if it is communicated.

EXAMPLE 15 *A community member applies to become a volunteer mentor at his local public school. After conducting an interview, reference checks, and a criminal history background check, the school social worker informs him that they do not have an appropriate match for him at this time. The applicant becomes angry and demands to know the "real reason" that he cannot serve as a mentor. Under this pressure the social worker reveals that the applicant's interview raised several red flags, including a seemingly unhealthy compulsion to engage in activities that involve young girls (to the exclusion of other, age-appropriate activities). The volunteer storms out of the school and later files a defamation suit.*

This prospective volunteer has no defamation claim: the information was not communicated to anyone other than himself.

There are two significant defenses to a defamation claim and they would, in most cases, protect the board from liability. The first, an absolute defense, is truth.

EXAMPLE 16 *A volunteer tutor at an elementary school is found working alone with a student in a closed and empty classroom. She is informed politely that this is a violation of school policy and that if she is going to do one-on-one tutoring, she must do it in a room with the door open. After a second violation of the policy, the school asks the volunteer to cease her volunteer services for the school. Several weeks later, a neighboring school calls to ask for information about the volunteer. The first school reveals that the volunteer was asked to leave for violating school policy about being alone with students in closed rooms—after being warned about it—and that she was not welcome to perform volunteer services for the school in the future. The new school decides not to place the volunteer in a position.*

If the volunteer sues the first school for defamation, the board would not be held liable because the information revealed was true.

What if the allegedly defamatory statement is not objectively verifiable? That is, what if the statement is one of opinion rather than fact?

EXAMPLE 17 *A school counselor interviews a prospective volunteer for the position of after-school mentor. Ultimately the school decides not to place the applicant in that position. A week later a nearby school seeks* *information about the applicant, who has come to that school seeking a similar position. The counselor reveals that the applicant was not offered the position of after-school mentor because during the interview he indicated—in the eyes of the counselor—an unhealthy interest in being with children and an under-involvement in activities that were appropriate for his age. Armed with that information, the nearby school also denies the volunteer a position and, in the course of doing so, reveals what the counselor from the first school said about him. He sues the board for defamation.*

The board probably would not be held liable for defamation in these circumstances because the statement of opinion does not seem to be based on personal knowledge of specific facts that are defamatory. The statement seems to be based on a more amorphous impression.

The other important defense to a defamation action is qualified privilege. Even if the defamatory statement turns out to be false, the board will not be held liable if the statement was made in good faith, if the person who made it was upholding a valid interest or pursuing a legal right or duty, and if the person who heard the statement had a corresponding interest, right, or duty.[36] So, in Example 17, the board could assert (probably successfully) qualified privilege as to the counselor's statement that the volunteer was overly interested in spending time with young children. The statement was made in good faith (the counselor did not intend to harm the volunteer, only to protect students), to a party at another school with a legitimate interest in it (and to no other party), and was made to uphold the school's interest in keeping potentially dangerous people away from students.

In contrast to a defamation action, where truth is a complete defense, an action for invasion of privacy might be brought when true information about a volunteer is revealed. As with the defamation action, the likelihood that such a suit would succeed is very small. Other repercussions—particularly the outrage of other volunteers and community members—could, however, be great.

With one exception, the records compiled on a given volunteer are not (and at present, *cannot be*) protected by a guarantee of confidentiality, because they are public records. North Carolina's Public Records Act[37] applies to the public schools and provides that all documents made or received by public officials and public employees in the course of their duties are public records open to inspection by anyone, unless some statutory provision makes them confidential. A prospective volunteer mentor whose application reveals that he was investigated by social services five years before on an abuse allegation has some cause for concern if he or she would like to keep this information (relatively) private. The one exception to the public records law would be a volunteer's criminal history report received from the SBI.[38]

A board need not have great fear of legal claims based on a breach of volunteer privacy. North Carolina courts have so tightly restricted the kinds of tort-based privacy actions they will recognize that there really is not a viable action for public disclosure of a private fact.[39] There is, in addition to the tort action, a "zone of privacy" in which personal, private information in which an individual has a reasonable expectation of confidentiality is constitutionally protected.[40] However, this right to privacy, as a general matter, suffers short shrift in the balance between the right of free speech and the public's compelling interest in newsworthy information.[41]

Another reason breach of privacy actions are probably of little legal moment for a board is that volunteers will have consented to most screening mechanisms that might reveal personal information (for example, interviews, reference checks, investigations of criminal history, or driving record checks), and those who do not consent need only seek volunteer opportunities elsewhere to avoid losing their privacy. For consent to operate as a defense to a breach of privacy claim, however, it must have been *informed*. Consent is not informed if the volunteer is allowed to believe that only designated school officials will see the information. If the lack of confidentiality is not disclosed and the volunteer's private information is rereleased by the school, the consent will be negated. Although the initial breach of privacy was authorized, the second—publication—was not.

Thus there is really little, at this writing, that can be done to address the legitimate privacy concerns of prospective volunteers. In the short term, there is not much a board can do about the problem, aside from lobbying the legislature to expand the realm of confidentiality granted employee personnel records to cover records of certain volunteers.

The board should also be very clear up front about the fact that the school cannot keep confidential any information (other than criminal history gained under statute from the SBI) and should explain why this is so—*before* the volunteer has revealed private information.

Summary—Volunteer Rights

The term "volunteer rights" is misleading because it connotes legal entitlements that are due to volunteers *because* they are volunteers; in this sense, there is no such thing as volunteer rights. Persons who volunteer their services to the public schools are entitled to be free of intentional discrimination on the basis of race, gender, disability, and age because they are citizens of the United States, not because they are volunteers. The same is true for the right to sue in cases of alleged defamation or breach of privacy.

Most people would agree that volunteers, as people who are willing to give their time and skills without expectation of recompense, are entitled to be treated with a certain amount of respect. Thus although the legal standard of reasonableness requires a board's volunteer policy to impose requirements that are *at least as* stringent as those needed to address the risks posed by a position, practical standards of fair treatment might dictate that the policy should not impose requirements on volunteers that are *more* stringent than those required by the risks of the position. More succinctly, volunteers should not be subject to screening that is more invasive than is justified by the risks they pose and should not be required to undergo training for skills their positions do not demand. The legal standard that requires consistency and uniformity in the application of a policy's elements comports with the notion that volunteers should be placed in positions because their skills and interests are matched to them—not because of who they know, what they look like, or how they talk.

Benefits

As has been discussed, there are several potential drawbacks to the development and implementation of an official volunteer policy in the public schools. Each of these criticisms is worthy of consideration. In the end, however, boards that wish to continue using volunteers must adopt some kind of reasonable policy governing the conditions under which they serve. Fortunately such policies do create benefits in programs and activities involving volunteers.

Most obviously—and most importantly—requiring volunteers to meet specific criteria for specific positions can help to keep unsafe or inappropriate individuals off school premises and away from students and staff. Screening, in addition to training and supervision, also increases the likelihood that volunteers are placed in positions in which they are able to perform well and, as a result, are less likely to cause or suffer harm.

An official volunteer policy also reduces a school board's liability exposure. Fewer potential injuries mean fewer potential lawsuits. And the existence of a volunteer policy may act as a deterrent to suits even when injury does occur. Because evidence of "due care" will be shown through careful application of a volunteer policy, persons injured may be less likely to bring suit. If a lawsuit is filed, the existence of an official volunteer policy will help protect a school board from liability by showing that it took reasonable measures to keep its volunteer program safe.

There are also other, smaller benefits that may flow from an official volunteer policy. The existence of job descriptions along with published screening requirements allows prospective volunteers to self-screen for a position and thus removes unfit applicants from the pool. Clear rules help people understand their duties and the limits of their roles; people work better when they know what is expected of them. Written rules, consistently applied, also make the application of unpleasant requirements less onerous. When the principal's brother wants to be a mentor but objects to being screened, school personnel can explain that the policy requires the screening for every volunteer without exception. A policy that requires all volunteers to meet specific criteria before assuming positions in the schools can make the rejection of a particular volunteer seem less personal and arbitrary than it otherwise might.

Now is the time to develop an official volunteer policy.

Notes

1. John Patterson et al., *Child Abuse Prevention Primer for Your Organization* (Washington, D.C.: Nonprofit Risk Management Center, 1995), 41.

2. Koran I. v. New York City Bd. of Educ. 683 N.Y.S. 2d 228, 132 Ed. Rptr. 170 (N.Y. 1998) (school district sued by student who was sexually harrassed by a volunteer teacher); Teters v. Scottsbluff Pub. Sch., 567 N.W.2d 314 (Neb. Ct. App. 1997), *rev'd in part*, 592 N.W.2d 155 (Neb. 1999) (school district sued for injury suffered by volunteer chaperone on property owned by district); Wolfe v. Dublin Unified Sch. Dist., 65 Cal. Rptr. 2d 280 (Ct. App. 1997) (school district sued for injuries student suffered in accident involving car driven by volunteer); Swearinger v. Fall River Joint Unified Sch. Dist., 212 Cal. Rptr. 400 (Ct. App.), *dismissed*, 709 P.2d 430 (Cal. 1985) (school district sued for student injuries from accident that occurred while she was riding in car driven by volunteer).

3. Lisa Green Markoff, *A Volunteer's Thankless Task*, 11 NAT'L L.J. 1, col. 1 (Sept. 1988) Gary Taylor, *Goodwill Must Pay $5 M in Murder by Parolee-Employee*, 9 NAT'L L.J. 22, col. 1 (June 1987); David Rohn, "YMCA, Pool Victim Settle: 5 Year Old to Get $4,000 a Month Initially," *Washington Post*, May 17, 1978, at A4, col. 1; Kristen A. Goss, "Boy Scouts of America Win Victory in Sex Abuse Case; Jury Fails to Find Negligence by National Organization," *Chronicle of Philanthropy* 1 (Jan. 1989): 15, col. 1 (discusses a well-publicized sexual molestation claim against the Boy Scouts, which sought $430 million. At trial, the judge dismissed the punitive damages claim, and the jury absolved the national organization of liability while holding the local chapter liable for $45,000 in compensatory damages); Thomas Health, "$45,000 Award to Molested Youth Hailed as Victory by Scouts," *Washington Post*, Jan. 12, 1989, at D1, col. 1; Damond Benigfield, "Who's Minding the Nonprofits?" *Texas Insuror* (Jan./Feb. 1987) (a sexual molestation claimant sought $24 million). *Collected in* Charles Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 402, n.5 (Jan. 1991).

4. *See, e.g., Swearinger*, 212 Cal. Rptr. 400.

5. *See* Chapter 3. An example of a successfully structured relationship of this kind, at least according to one commentator, is the relationship between the city of New York and the volunteer anticrime group the Guardian Angels. In a memorandum of agreement between the two entities, the city recognized the Guardian Angels as "an independent, autonomous citizens [sic] group," and stated that they were not city employees. The city retained no right to impose criteria on the group for selection of its members and, although the group agreed to keep city police informed of its planned patrols, the city played no role in scheduling them or monitoring them.

BEST COPY AVAILABLE

Comment, *Municipal Liability for Torts Committed by Volunteer Anticrime Groups*, 10 FORDHAM URB. L.J. 595, 627–28 (1982).

6. See pp. 78–84 for a discussion of this topic.

7. During the 1996–97 school year, the Chapel Hill–Carrboro City Schools (CHCCS), under the guidance of Pam Bailey (coordinator of volunteer programs in the system) and Kim Hoke (assistant to the superintendent), created a screening policy workgroup composed of school board members; parents; school counselors; principals and teachers; PTA members; a representative of the State Bureau of Investigation; two attorneys with knowledge of school law; and other interested community members. The workgroup's assignment—in relevant part—was to recommend changes to a screening policy developed by the CHCCS board and to review the implementation of the policy in the schools within the system.

8. List adapted from CHCCS's "Volunteer Screening Policy, Regulation, and Sample Forms" (hereinafter CHCCS Volunteer Policy), dated May 25, 1997.

9. Appendix B contains a chart adapted from CHCCS's form for categorizing positions using these factors.

10. In this respect, it may not be a bad idea for a board to include a job description in each volunteer's file, with the volunteer's signature indicating understanding and acceptance of the role.

11. John C. Patterson, *Staff Screening Tool Kit* (Washington, D.C.: Nonprofit Risk management center, 1998), 39–40.

12. *Id.*

13. An interview protocol, geared toward applicants for high-risk roles, can be found in Appendix C.

14. List adapted from Patterson, *Staff Screening Tool Kit*, 49–52.

15. A new law passed by the General Assembly might help mitigate the reluctance of employers to give references to schools: It essentially codifies the law of defamation and provides qualified immunity for employers and former employers who give information about a present or former employee's job performance to prospective employers. Chapter 1, Section 539.12 of the North Carolina General Statutes (hereinafter G.S.). Immunity would not apply in situations where the employer gives false information about the employee that the employer knew, or should have known, was false. Although schools are not, strictly speaking, prospective employers when they are dealing with volunteers, their interest in the reference is often just as pressing, and the statute could be interpreted to provide immunity to employers who give them references.

16. Reference checks and most of the record checks discussed in this section require the consent of the volunteer before they may be conducted. For criminal record checks and motor vehicle records, the State Bureau of Investigation (SBI) and the Division of Motor vehicles (DMV) have their own consent forms. Appendix E contains a sample of a general consent form.

17. The Chapman Corporation [(800) 206-4054] is one such company; Edwards & Associates [(910) 786-1962] is another.

18. G.S. 114-19.3(a)(10).

19. The SBI will not guarantee that a name search has uncovered all criminal history on an individual or that the search has not turned up history for another indi-

vidual with the same name. Unlike the search conducted by the private company, however, the SBI search often reveals more than just criminal cases filed with the volunteer's name on them; SBI records may also reveal arrests, charges, and dispositions.

20. The SBI will guarantee the thoroughness and accuracy of searches conducted on the basis of fingerprints.

21. G.S. 114-19.2; 115C-332.

22. 42 U.S.C. § 5119, *et seq.*

23. G.S. § 14-208.6, *et seq.*

24. G.S. § 14-208.23–24.

25. G.S. § 14-208.9a.

26. G.S. § 14-208.10.

27. Other screening mechanisms are, of course, available, but they do not warrant separate discussion because of the small likelihood, and limited appropriateness, of their use in the public school context..Such mechanisms include drug and alcohol testing, home visits, and psychological testing.

28. To reinforce a volunteer's knowledge of such policies, the CHCCS workgroup developed a volunteer sign-in sheet that reiterates the policies and concludes with the following: "My signature below indicates that I have read and agree to abide by the policies of the Chapel Hill–Carrboro City Schools, including the above." CHCCS Volunteer Policy, 14. *See* Appendix D.

29. *See, e.g.*, Stanley v. Brooks, 112 N.C. App. 609, 613, 436 S.E.2d 272, 274 (1993), *review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994).

30. Aside, of course, from the qualified immunity granted them under the Volunteer Protection Act (discussed in Chapter 1). For the purposes of this chapter, what is more to the point is that they have no particular rights or protections in the context of *becoming* volunteers.

31. G.S. 115C-319 through -321.

32. U.S. CONST. amend. XIV. While there is no legal precedent directly on point, it seems likely that the broad language of the related civil rights statutes prohibiting gender, race, disability, and age discrimination in programs receiving federal funding [e.g., Title IX, 20 U.S.C. § 1681 *et seq.* ("No person in the United States shall, on the ground of [sex, race, disability, age], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); Title VI, 42 U.S.C. § 2000d *et seq.*; Rehabilitation Act § 504, 29 U.S.C. §·794 *et seq.*; Age Discrimination Act of 1975, 42 U.S.C. § 6101] would apply to prohibit discrimination in public school volunteer programs.

33. Assuming that the statutes discussed in note 32, above, would give volunteers who have been discriminated against the right to sue, the question remains whether these statutes reach disparate impact discrimination. The law, as it concerns Title IX, Title VI, and the Age Discrimination Act, is unsettled. *Compare, e.g.*, Cannon v. University of Chicago, 441 U.S. 667 (1979) (no disparate impact under Title IX) *and* Sharif by Salahuddin v. New York State Educ. Dep't, 709 F. Supp. 345 (S.D.N.Y. 1989) (disparate impact allowed under Title IX regulations); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (Title VI itself requires proof of discriminatory intent, but regulations incorporating a disparate impact standard are

valid). It seems more likely than not that Section 504 of the Rehabilitation Act, however, does not require proof of discriminatory intent. In its most definitive statement on the topic to date, the Supreme Court said: "While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." Alexander v. Choate, 469 U.S. 287, 299 (1984). The Fourteenth Amendment to the United States Constitution does not reach disparate impact discrimination. Washington v. Davis, 426 U.S. 229 (1979). In any event, it seems likely that if a disparate impact claim is allowed under any or all of these statutes, volunteers' remedies would be limited to injunctive and declaratory, rather than monetary, relief.

34. If the parents do have a claim, the board, in order to prevail despite a showing that its policy does disproportionately affect a protected group, will have to show a legitimate nondiscriminatory reason for the policy. In Example 14, the board might, for instance, argue that it has an interest in providing role models to encourage students to stay in school and that requiring volunteers to have high school diplomas serves that purpose.

35. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 111 (5th ed. 1984).

36. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).

37. G.S. 132-1 through -9.

38. G.S. 114-19.3.

39. Of the four traditional tort-based privacy actions—misappropriation of plaintiff's name or likeness, disclosure of private facts, false light, and intrusion upon plaintiff's seclusion—North Carolina courts have recognized only the first, expressly rejected the second and third, and declined to rule on the existence of the fourth. In any event, the possibility of a volunteer bringing an intrusion upon seclusion action seems minimal, given that consent presumably would have been obtained before any investigation was performed. Phillips v. J.P. Stevens, 827 F. Supp. 349, 352 (M.D.N.C. 1993).

40. Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990).

41. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("[I]n a society in which each individual has limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.").

Appendix A
Volunteer Protection Act of 1997

SEC. 1. SHORT TITLE.

This Act may be cited as the 'Volunteer Protection Act of 1997.'

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS—The Congress finds and declares that:

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because:

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

93

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D) (i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

(ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) PURPOSE—The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

SEC. 3. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION—This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY—This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation:

(1) citing the authority of this subsection;

(2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

SEC. 4. LIMITATION ON LIABILITY FOR VOLUNTEERS.

(a) LIABILITY PROTECTION FOR VOLUNTEERS—Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if:

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to:

(A) possess an operator's license; or

(B) maintain insurance.

(b) CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES—Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY—Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION—If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF VOLUNTEERS:

(1) GENERAL RULE—Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION—Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) EXCEPTIONS TO LIMITATIONS ON LIABILITY:

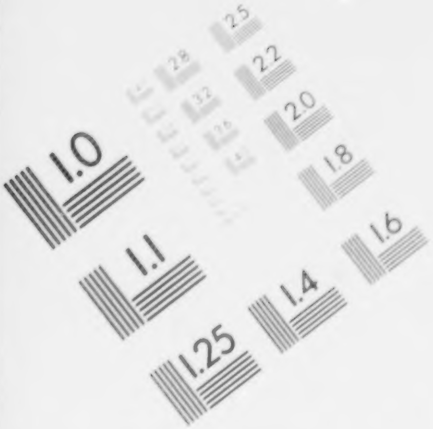
(1) IN GENERAL—The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that:

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

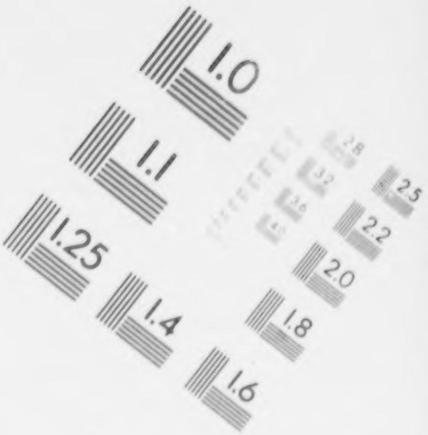

1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0

AIIM

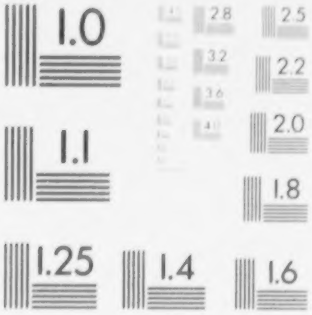
Association for Information and Image Management

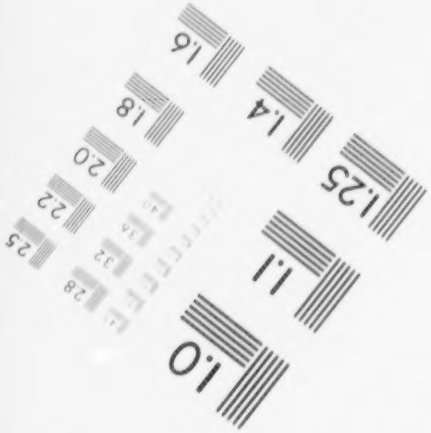
1100 Wayne Avenue, Suite 1100
Silver Spring, Maryland 20910

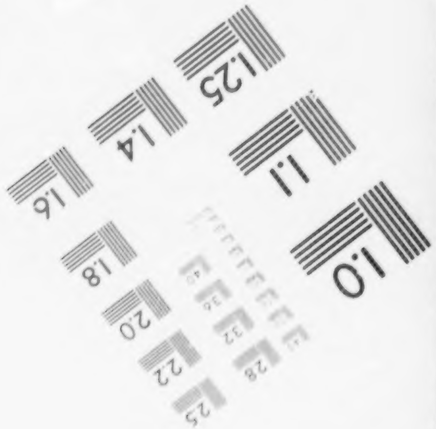
301/587-8202


1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0

Centimeter
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
mm
1
2
3
4
5
Inches


1.0
2.8
2.5
3.2
2.2
3.6
4.0
2.0
1.1
1.8
1.25
1.4
1.6


1.6
1.8
1.4
2.0
1.25
2.2
2.5
3.2
3.6
4.0
2.8
1.1
1.0


1.25
1.4
1.1
1.6
1.0
1.8
4.0
3.6
3.2
2.0
2.8
2.2
2.5

MANUFACTURED TO AIIM STANDARDS
BY APPLIED IMAGE, INC.

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) RULE OF CONSTRUCTION—Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

SEC. 5. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE—In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY:

(1) IN GENERAL—Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY—For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

SEC. 6. DEFINITIONS.

For purposes of this Act:

(1) ECONOMIC LOSS—The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM—The term 'harm' includes physical, nonphysical, economic, and noneconomic losses.

(3) NONECONOMIC LOSSES—The term 'noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of con-

sortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) NONPROFIT ORGANIZATION—The term 'nonprofit organization' means:

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(5) STATE—The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) VOLUNTEER—The term 'volunteer' means an individual performing services for a nonprofit organization or a governmental entity who does not receive:

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of $500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

SEC. 7. EFFECTIVE DATE.

(a) IN GENERAL—This Act shall take effect 90 days after the date of enactment of this Act.

(b) APPLICATION—This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.

Appendix B
Volunteer Position Risk-Assessment Tool

In the course of its meetings, the CHCCS volunteer screening workgroup developed a table similar to the one below. The table is a useful example of how to coordinate the risks of a position with screening mechanisms.

Position Description	Screening Tools	Possible Examples†
Risk Level 1: Job takes place in highly public settings under supervision and involves little or no student contact *Descriptors:* • Highly public setting • Unrestricted access—staff or adults can see volunteer at any time; in other words, always within unbroken view of school staff or multiple adults • No solitary time with students	• Staff maintains a list of volunteer assistants or volunteer signs in	• Athletic concessions • Resource speakers • Read-a-thon • SGC representatives
Risk Level 2: Job takes place in classroom under supervision *Descriptors:* • Highly public • Unrestricted access • No solitary time with students • Always within sight of staff or multiple adults, but ability of staff or others to monitor volunteer's interaction with students limited by other responsibilities or factors	• Staff maintains list of volunteer assistants or volunteers sign in; volunteer registration • Prior dialogue/interaction with school staff or volunteer coordinator in person, in writing, or by phone	• Classroom tutors • Classroom helpers

---

† These examples are for illustration only. Risk factors inherent in each role may differ across schools. The position descriptions with their lists of risk factors should determine the level of screening a volunteer receives, not the position title.

Position Description	Screening Tools	Possible Examples†
Risk Level 3: Job involves direct contact with students under limited supervision by school staff *Descriptors:* • Public setting at school • Unrestricted access: staff or other adults can enter/observe at any time • Could have solitary time with students, of short duration • May be outside of view of staff or other adults for brief periods of time • May involve access to confidential student information	• Staff maintains list of volunteers or volunteers sign in • Position description • Application The following tools are also required but may be waived for individuals who have been active classroom volunteers and have the recommendation of school staff who know them well[1] • Interview • Reference checks • Criminal history check recommended for all volunteers with frequent/regular solitary time with students	• Coaching sports • Working with a group of students in a separate room • Sick room volunteer • Tutoring one-on-one in a separate room
Risk Level 4: Job allows unsupervised contact with student off campus *Descriptors:* • Private setting in home and community likely • Access can be restricted by volunteer • Solitary time with student commonplace • Likely to have frequent contact with student over extended period of time	• Role description • Registration/application • In-depth interview • Reference checks • Criminal history check Note: it may be appropriate to add other screens, such as home visits, TB tests, and driving history checks	• Mentoring • Field trip chaperone when sharing room with students other than own children
Special Roles: Job requires volunteer to transport students or staff in own vehicle	• Volunteer driver registration (including signed statement attesting to past moving violations, license suspensions, or revocations and accidents, if any) • Evidence of valid driver's license (possibly driving history check) • Proof of insurance	• Transporting students

---

[1] As mentioned in Chapter 4, p. 66, the advisability of this kind of waiver is dubious unless its implementation is highly regulated.

Position Description	Screening Tools	Possible Examples
Special Roles: Job requires volunteer to use or supervise students in the use of dangerous machinery or equipment	- Role description - Registration/application - Demonstrated competency in relevant area	- Helping in shop class - Assisting students using kiln

Appendix C
Interview Protocol
(for higher-risk roles)

Applicant's Name: ______________________________ Date:____________

Interviewer's Name: ____

1. VOLUNTEER'S CURRENT STATUS
   - How did you come to live in this city?
   - What type of work do you do?
2. VOLUNTEER'S CURRENT LIVING SITUATION
   - Who lives with you?
   - How do the people with whom you live feel about you becoming a volunteer?
   - Do you see the other people in your family being affected by your involvement in this role?

   At this point, it would be appropriate to describe the role for which the volunteer is interviewing and the details of the commitment.

   - background
   - expectations of the program
   - commitment
   - supervision and support
3. VOLUNTEER'S CHILDHOOD AND FAMILY
   - Talk to me about growing up. What was your family like?
   - Were there adults who made a difference in your life?
   - Do you stay in touch with your parents, siblings, children, etc.?
4. VOLUNTEER'S LEISURE ACTIVITIES
   - What kinds of things do you like to do in your spare time?
   - Who do you like to spend time with?

Note: Adapted from model used by CHCCS workgroup.

5. VOLUNTEER'S PLANS FOR THE FUTURE
    - What do you see yourself doing in two years?
    - Do you foresee any major life changes in the next two years (e.g., marriage, move, new baby)?

6. PRIOR EXPERIENCE WITH CHILDREN OR VOLUNTEERS
    - Describe the previous relationships you have had with children.
    - Are you/have you been involved in other volunteer programs with children?

7. MOTIVATION
    - What led you to consider taking on this particular volunteer role?
    - How did you find out about the program?
    - Why are you interested in performing this role?

8. ATTITUDES CONCERNING CHILDREN
    - What do you think are some of the problems facing children today?
    - Are today's problems facing children different from when you were growing up? If yes, how so?

9. ATTITUDES CONCERNING DISCIPLINE
    - What is your philosophy on discipline?
    - What disciplinary techniques have you used with children? What works and why?

10. STRENGTHS
    - What strengths do you feel you bring to this role?

11. VOLUNTEER'S ROLE WITH THE SCHOOLS
    - How familiar are you with the school system?
    - How do you feel about the job the schools are doing with children today?
    - Would you feel comfortable working in this role with school personnel?

12. PLANNED ACTIVITIES
    - What kinds of things do you plan to do with the child you will be working with/role you will fill in the schools?

13. VOLUNTEER'S CONCERNS AND QUESTIONS
    - What particular concerns or apprehensions do you have about taking on this role?
    - What questions do you have about the program?

INTERVIEWER'S SUMMARY AND OVERALL IMPRESSIONS (please write a general overview of your impressions of the applicant and his/her appropriateness for the program. Include any gut reactions you may have or any concerns. If you have thoughts about what type of child may make the best match for this applicant, please specify and indicate your reasons. Attach a separate page if necessary):

____ Yes, I believe this applicant should be accepted as a volunteer if the right match can be made for him/her.

____ No, I do not believe this applicant should be accepted as a volunteer due to the reasons stated in the summary section.

Interviewer's Signature: ____________________ **Date:** ________

Appendix D
Volunteer and Visitor Sign-in Sheet

My signature below indicates that I agree to abide by the policies of the school, including:

Policies for School Volunteers and Visitors:

__ This school is a smoke-, alcohol-, and drug-free zone

__ No one other than school staff may take a student off campus without written permission of the parents and the school principal

__ No child is to receive any form of corporal punishment

__ No one other than approved school staff may administer medicines

__ Information from student records received as a result of an individual's activities in the school is strictly confidential

Date	Name	Destination	Time In	Time Out

Note: Adapted from CHCCS workgroup forms.

Appendix E
General Consent Form for Volunteers

I, (volunteer's name) hereby authorize the (school system's name) to:*

___ contact the references I have listed

___ obtain information concerning my driving history from the Department of Motor Vehicles

___ obtain, to the extent allowed by state and federal law, information concerning any pending charges or convictions I may have for violations of state or federal law

I understand that though the purpose of these investigative methods is to determine my fitness to serve as a volunteer working with children, the information so gathered will not necessarily be limited to charges and or convictions involving children. I further understand that all information gathered during this investigation, save that specifically protected by statute or other law, is a matter of public record. *By signing this form I have waived my right to bring an action for defamation, invasion of privacy, or any similar cause against the (school system's name).***

Signed ______________________ Date __________

Social Security Number______________________

Driver's License Number______________________

State of Issuance______________ Expiration Date __________

---

*Note that it is important to have a prospective volunteer check only those boxes corresponding to searches that will actually be conducted. To have a volunteer check all boxes leads to the impression that all the checks will be conducted; failure to then conduct the checks can look like failure to reasonably apply a reasonably developed policy.

**Waivers are a tricky issue. Many people seeing such a waiver may refuse to sign the consent form. If that turns out to be the case in a given school system, remove the waiver. As discussed in Chapter 4, the consent alone should be sufficient—assuming informed consent—to head off any lawsuit before it gets far.

Ingrid Johansen is a research fellow with the Institute of Government. Although writing and consulting in many different fields, she specializes in school law topics and since 1995 has edited the "Clearinghouse" section of the Institute's *School Law Bulletin*. Currently she is working on an expanded version of this book for a nationwide audience. She lives in Austin, Texas.

Other Institute of Government publications include

County Government in North Carolina

Fourth edition, 1999

Edited by A. Fleming Bell, II, and Warren Jake Wicker

A reference book on county government in North Carolina with a comprehensive treatment of the legal foundations, organization, and administration of the state's counties. Includes changes in the laws and procedures made by the 1998 session of the North Carolina General Assembly affecting purchasing, social services, education, and other areas. Contains expanded coverage of water and sewer services and new sections on airports, off-street parking, public transportation, aging programs, registers of deeds, and community colleges.

Employment Law: A Guide for North Carolina Public Employers

Third edition, 1999

Stephen Allred

Offers guidance to public employers and employees in North Carolina on the law governing the employment relationship. Primarily intended as an explanation of the law, not a policy guide. Examines topics such as the employment-at-will doctrine and its exceptions; employment discrimination claims; recruitment and selection; discipline and discharge; constitutional issues in employment; the Americans with Disabilities Act; the Family and Medical Leave Act; the North Carolina Workers' Compensation Act; public records; and public-official liability. The book contains sample personnel policies in the appendixes, including a new sample policy on drug and alcohol testing.

Ethics, Conflicts, and Offices: A Guide for Local Officials

1997

A. Fleming Bell, II

Explains in detail North Carolina's laws governing conflicts of interest and the holding of multiple offices, and examines the use of codes of ethics in local government. Also available, *Ethics in Public Life*, a book published in 1998 of interest to public officials everywhere, excerpted and adapted from *Ethics, Conflicts, and Offices: A Guide for Local Officials.*

School Law Bulletin

Edited by Robert P. Joyce, this magazine is a quarterly publication written by school attorneys for school administrators and board members. Each issue contains two or three articles on subjects that directly affect the operation of schools, as well as "Clearinghouse," a digest of recent state, federal, and state attorney general opinions in the area of school law. Subscriptions and individual issues are available.

North Carolina Juvenile Code and Related Statutes Annotated

1999

Published by LEXIS Law Publishing

This publication contains the entire Juvenile Code (new Chapter 7B of the North Carolina General Statutes), which took effect July 1, 1999. It also includes related statutes dealing with juvenile justice agencies, local confinement facilities, adoptions, schools, and medical treatment of minors.

For more information on these and other publications, call the Institute of Government Publications Sales Office at **(919) 966-4119** or locate us on the internet at **http://ncinfo.iog.unc.edu.**

99.09

1-56011-358-8